Supreme Court, U. S.
FILED
NOV 10 1976
MICHAEL RODAK, JR., CLERK

76-659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No._____

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Petitioner,

versus

DEKALB COUNTY, GEORGIA,
Respondent,

UNITED STATES OF AMERICA,
Respondent, Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,
Respondent, Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. Russell Blank
Claude R. Ross
Baxter H. Finch
Attorneys for Petitioners

Of Counsel:
ROSS & FINCH
3417 First National Bank Tower
Atlanta, Georgia 30303

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 11

REASONS FOR GRANTING THE WRIT 15

CONCLUSION 25

APPENDICES:

Appendix A—Opinion of the Court of Appeals entered August 25, 1976 ..... 1a

Appendix B—Opinion of the Court of Appeals, entered January 30, 1976 ..... 1b

Appendix C—Opinion of the District Court, entered September 25, 1974 ..... 1c

Appendix D—Opinion of the District Court, entered June 27, 1974 ..... 1d

TABLE OF AUTHORITIES

Cases:

Adams v. Harris County, Texas (Appeal Number 75-1818, filed June 16, 1976 20

Barlow v. Collins, 397 U.S. 159 (1970) 22

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967) 23

TABLE OF AUTHORITIES (Continued)

Page

Cases—Continued:

Braniff Airways v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954) 15

Briggs v. Sagers, 424 F.2d 130 (10th Cir. 1970) 16

Bruce v. Wichita State University (Appeal Number 76-38, filed July 12, 1976) 20

Campbell v. State, 284 N.E. 2d 733 (Ind. 1972) 19

Centraal Stikstof Verkoopkantoor v. Alabama State Docks Department, 415 F.2d 451 (5th Cir. 1969) 16

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968) 16

City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972) 22

Cort v. Ash, 422 U.S. 66 (1975) 17

Data Processing Service v. Camp, 397 U.S. 150 (1970) 22

Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) 24

Hicks v. State, 544 P.2d 1133 (N.M. 1975) 19

Moliter v. Kaneland Community Unit District Number 302, 164 N.E. 2d 89 (Ill. 1959) 19

Parden v. Terminal Railroad of Alabama Docks Department, 377 U.S. 184 (1964) 16

Parish v. Pitts, 429 S.W. 2d 45 (Ark. 1968) 19

TABLE OF AUTHORITIES (Continued)

Page

Cases—Continued:

Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3rd Cir. 1971) 16

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D. Pa. 1967) 23

Rauch v. United Instruments, Inc., 405 F.Supp. 435, on rehearing, 405 F.Supp. 442 (E.D. Pa. 1975) ... 18

Spanel v. Mounds View School District Number 621, 118 N.W. 2d 795 (Minn. 1962) 19

Town of New Windsor v. Ronan, 481 F.2d 450 (2nd Cir. 1973) 22, 23

United States v. Orleans, ____ U.S. ____, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976) 24

Wade v. Hankenberns (Appeal Number 75-1637, filed May 10, 1976) 20

Statutes:

49 U.S.C. §1716 3

49 U.S.C. §1718 5

Georgia Code Annotated §11-201 8

Georgia Code Annotated §11-405 9

Georgia Code Annotated §3-108 10

Georgia Code Annotated §72-103 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No._____

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,

Petitioner,

versus

DEKALB COUNTY, GEORGIA,

Respondent,

UNITED STATES OF AMERICA,

Respondent, Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,

Respondent, Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The en banc opinion of the Court of Appeals is not yet reported, but is reprinted in Appendix A hereto, *infra*, page 1a. The opinion of the Court of Appeals prior to its decision and judgment after rehearing is reported at 526 F.2d 679, and is reprinted in Appendix B hereto, *infra*, page 1b. The opinion of the District Court dated September 25, 1974, which is not reported,

but was issued upon reconsideration of its original order, is reprinted as Appendix C hereto, *infra*, page 1c. The original opinion of the District Court dated June 27, 1974, which is not reported, is reprinted as Appendix D hereto, *infra*, page 1d.

JURISDICTION

The judgment of the Court of Appeals, which is reprinted in Appendix B hereto, *infra*, page 1b, was entered on January 30, 1976. Respondent filed a petition for rehearing in the Court of Appeals being modified by judgment entered on August 25, 1976, which is reprinted in Appendix A hereto, *infra*, page 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Federal Airport and Airway Development Act, 49 U.S.C. §1701, et seq., provide a remedy to survivors of deceased passengers aboard an aircraft which crashed because of a county's violation of the provisions thereof?

2. Is the recognition of the doctrine of sovereign immunity a violation of the equal protection and commerce clauses of the United States Constitution, where the total distinction under Georgia law is whether the airport was being operated by a municipality or a county?

3. Do the plaintiffs have standing as beneficiaries of numerous Grant Agreements between the United States and DeKalb County, Georgia, to sue for the losses they have sustained?

STATUTES INVOLVED

The following Acts and statutes are relevant to the questions presented by this Petition:

"Project applications for airport development

Submission

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the municipality or other public agency is prohibited by the law of that State.

Approval

(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provision for the installation of the landing aids specified in subsection (d) of section 1717 of this title and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect. . . ."

(Pub.L. 91-258, Title I, §16, May 21, 1970, 84 Stat. 226; 1970 Reort. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Pub.L. 93-44, §4, June 18, 1973, 87 Stat. 89. 49 U.S.C. §1716.)

"Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors

As a condition precedent to his approval of an airport development project under this subchapter, the

Secretary shall receive assurances in writing, satisfactory to him, that—

Public use

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

Maintenance and operation

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

Airport hazards

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

Compatible use of adjacent land

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Government use; charge

(5) all of the facilities of the airport developed with Federal financial assistance and all those usable for

landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used;

Air traffic control activities

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

Accounting

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

Self-sustaining fee and rental structure

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection;

Reports

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

Inspection of records

(10) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under this subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this section."

(Pub.L. 91-258, Title I, §18, May 21, 1970, 84 Stat. 229. 49 U.S.C. §1718.)

"Municipalities, etc., may acquire airports

Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to

acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties, or political subdivisions. All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other State, as well as all municipalities and other political subdivisions which are located in such boundary counties, are hereby authorized, separately, jointly with each other or jointly with any county, municipality or political subdivision of any such border State, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing-fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality or political subdivision of any such border State other than the State of Georgia."

(Acts 1933, p. 102; 1941, p. 380. Georgia Code Annotated §11-201.)

"Airport Zoning; things to be considered in adopting or revising

In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected

to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the Federal Government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport."

(Acts 1946, pp. 121, 123. Georgia Code Annotated §11-405.)

"Parties to actions on contracts

As a general rule, the action on a contract, whether express or implied, or whether by patrol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

(Acts 1949, p. 455. Georgia Code Annotated §3-108.)

"Right of action to individual for public nuisance

Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public do not participate, such special damage shall give a right of action."

(Georgia Code Annotated §72-103.)

STATEMENT OF THE CASE

On February 26, 1973, at approximately 10:12 a.m., a Learjet Model 24 aircraft took off from Runway 20L at DeKalb-Peachtree Airport in Atlanta, Georgia. Immediately after becoming airborne, the turbine or jet engines of said aircraft ingested a large number of birds, which resulted in the loss of the necessary engine thrust and the eventual crash of said aircraft, killing all passengers aboard, including Plaintiff's husband, David Emanuel Phillips.

DeKalb-Peachtree Airport is located in DeKalb County, Georgia, on land transferred to said County by the General Services Administration of the United States of America on or about February, 1960. On said airport property and land deeded to DeKalb County, Georgia, by the United States of America, there was commenced in 1962 a garbage dump. Said garbage dump was closed from 1964 through 1966, when it was reopened, and has been continuously utilized as such through and including the time of the crash here involved.

For several years prior to February 26, 1973, DeKalb County, Georgia, and the United States of America discussed, corresponded, met, and argued over the closing of said garbage dump and the attraction of said garbage dump to thousands of migratory birds.

Nevertheless, since 1960, DeKalb County was the recipient of six separate Federal Grant Agreements with the United States pursuant to the Federal Airport and Airway Development Act, 49 U.S.C. §1711, et seq., and such Act's predecessor, the Federal Airport Act, 49 U.S.C. §1110, et seq. In fact, the particular runway used by the Learjet aircraft here involved was con-

structed with monies received by DeKalb County pursuant to said Grant Agreements.

By said Grant Agreements, DeKalb County obligated itself to perform certain duties with regard to the use thereof, as well as land lying in the immediate vicinity of said airport. As taken from said contracts with the United States, there appears, *inter alia*, the following:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. *The Sponsor will operate the Airport as such for the use and benefit of the public.* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the Airport or necessary *to serve the civil aviation needs of the public.* . . .
>
> 6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for Airport purposes:* . . .
>
> 11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the

rights and powers necessary to perform any or all of the covenants herein made. . . .

12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might affect the *safety*, utility, or efficiency of the Airport.

13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.*"

Each of the above assurances, covenants, promises, and contractual obligations has been violated by the activities of DeKalb County, as well as others not herein specified.

Subsequent to the crash of the Learjet aircraft and the death of Plaintiff's decedent, the United States of America instituted an action in the United States District Court for the Northern District of Georgia, whereby it sought and obtained injunctive relief as to the operation of jet aircraft into and out of the DeKalb-Peachtree Airport. Plaintiff Judith Anita Phillips, widow of David Emanuel Phillips, deceased, instituted the present action for the wrongful death of

Plaintiff's decedent, against DeKalb County, Georgia, and the United States of America, pursuant to diversity jurisdiction, 28 U.S.C. §1332, and the Federal Tort Claims Act, 28 U.S.C. §1346(b), respectively. The Complaint as filed sought recovery against said Defendants upon the basis of negligence, nuisance, and as a third-party beneficiary to the contractual agreements between said Defendants. Defendant DeKalb County, Georgia, moved the District Court to dismiss Plaintiff's Complaint as failing to state a claim upon which relief can be granted, which motion was granted by the District Court on June 27, 1974. See Appendix D. The motion for reconsideration and to set aside said order and judgment was denied by the District Court by order dated September 24, 1974. See Appendix C. Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which Court on January 30, 1976, affirmed the District Court as to its dismissal of Plaintiff's Complaint upon the bases of negligence and nuisance, but reversed the District Court and held Plaintiff to be a third-party beneficiary of the subject Grant Agreements. See Appendix B. DeKalb County, Georgia, moved the Court for rehearing and rehearing en banc, and said petition was granted, resulting in the Court of Appeals' affirming the District Court holding in all respects by order and judgment entered August 25, 1976. See Appendix A.

Petitioner anticipates that several other petitions for a Writ of Certiorari will be presented by other representatives of those parties whose appeal were heard and determined by the Court. Said petitions should be filed either simultaneously herewith or within a short period of time prior to or subsequent to the filing of the present petition. Inasmuch as identical issues of law

are involved in each, Petitioner herein requests that a consolidated review be granted as to all such petitions.

REASONS FOR GRANTING THE WRIT

PART I

The first reason why this Honorable Court should grant the Petition for a Writ of Certiorari of Plaintiff Judith Anita Phillips (hereinafter referred to as "Phillips"), is that the Federal Airport and Airway Development Act, 49 U.S.C. §1701, et seq. (hereinafter referred to as "Act"), has been misconstrued and misapplied by the Courts below, and in conflict with interpretations and holdings by other Courts of Appeal.

As this Court has held, Federal Acts regulating air commerce are bottomed upon the commerce power granted to Congress for the control and regulation of interstate commerce. *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954). As such, Congress has exercised its legislative prerogatives and enacted the subject comprehensive statutory scheme whereby various Federal agencies are empowered to regulate the aviation industry, including but not limited to air carriers, airports, manufacturers of aircraft, and operators of airports and aircraft. There are few if any other areas of our general economy that have such a pervasive and all-encompassing statutory and regulatory network as air commerce.

Numerous cases have held that where there exists a paramount Federal interest in governing certain areas of commerce, State immunity interests must yield. Especially this is so where said State performs acts within the realm and scope of Congressional legislation.

In this regard, the holding of the Court below is in conflict with the prior holding of this Court, namely *Parden v. Terminal Railroad of Alabama Docks Department*, 377 U.S. 184 (1964), wherein this Court held that the State forfeited a portion of its sovereignty and waived its immunity for all acts done by the State within the realm of Congressional regulation. As such, said State acts as a private person or corporation, and is thus subject to regulation and suit as such. *Id.* at 196.

Since this Court's holding in *Parden*, numerous other Courts of Appeal have reached similar conclusions as to differing governmental enactments within the purview of the commerce clause. Even the United States Court of Appeals for the Fifth Circuit, in *Centraal Stikstof Verkoopkantoor v. Alabama State Docks Department*, 415 F.2d 452 (5th Cir., 1969), held that the State had entered the sphere of interstate and foreign commerce, and had thereby waived its immunity. Similar holdings as to the abrogation of immunity through statutory enactment and participation in interstate commerce can be found in such holdings as *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968) (finding a relinquishment of immunity in a suit by a ship owner against a Virginia tunnel district); *Briggs v. Sagers*, 424 F.2d 130 (10th Cir., 1970) (finding that the State of Utah waived immunity from liability under the Fair Labor Standards Act because of the regulatory power under the commerce clause); and *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971) (finding the highway department of said State not to be immune from suit).

Accordingly, the actions of the Court below are in conflict with the prior holdings of this tribunal, as well

as other Courts of Appeal throughout the United States. There exists no greater or more extensive statutory and regulatory framework than that governing and controlling the aviation industry. Private corporations and governmental entities act on an equal basis in the construction, management, and maintenance of various aircraft and airport facilities, and when a State enters into said sphere of influence, then it is similarly subject to all responsibilities and liabilities that may thereafter attach. Accordingly, without directly addressing the propriety of recognizing governmental immunity, the issue before the Court is whether the Federal Airport and Airways Development Act of 1970 will result in a waiver of sovereign immunity to those governmental entities exercising its rights and benefits thereunder.

A further reason for this Court's acknowledging a remedy under said statutory section reposes in the progeny resulting from this Court's holding in *Cort v. Ash*, 422 U.S. 66 (1975), wherein this Court reviewed, coalesced, and again recognized the principle of implied Federal remedies where such are necessary to effectuate the purpose of the legislation in question. In *Cort*, this Court specified four tests to be employed in the determination of whether a Federal civil remedy should be implied where none is specifically stated. Said tests are as follows:

> (1) Is the plaintiff in a class for whose especial benefit the statute was created?
>
> (2) Is there an explicit or implicit legislative intent to create or deny such a remedy?
>
> (3) Is the implication of a civil remedy to the plaintiff consistent with the underlying purpose of said legislation?

(4) Is the cause of action one traditionally relegated to State law in an area basically of concern to the States so as to make it inappropriate to infer a remedy on Federal law?

A careful review of the Act and its legislative history amply substantiates the conclusion that a Federal civil remedy would be compatible with the criteria enunciated in *Cort*. In fact, such a conclusion has already been reached by the United States District Court in *Rauch v. United Instruments, Inc.*, 405 F.Supp. 435, *on rehearing*, 405 F.Supp. 442 (E.D. Pa. 1975). With regard to the first test above, the Court in *Rauch* held that there was clearly an overriding legislative purpose to promote safety in aviation for those who own and/or fly in aircraft. Further, since death and/or injury is the result sought to be prevented, then suits for such damage clearly are proper. With regard to the second test, no legislative intent exists or can be found to deny private civil remedies under said Act. Third, a private right of action will encourage compliance with the Act, and is, therefore, consistent with the underlying purpose to promote air safety. Lastly, aviation and air commerce is not an area basically of concern to the States, and traditionally has been regulated by the Federal government. Consequently, the Court in *Rauch* recognized a private civil remedy under the particular Act here involved. It is just such a holding as is here sought by this Petition for Certiorari.

Accordingly, DeKalb County, Georgia, cannot rely upon the doctrine of governmental immunity when it enters the Federal sphere governing and controlling interstate commerce through aviation. In addition, there should be recognized an implied Federal remedy available to those for whose benefit the Act was created,

namely, the aeronautical users and participants in interstate air commerce.

PART II

A further reason for this Court's review of the opinion below is the continued viability of the defense of governmental immunity. Without a prolonged recitation as to the development of said doctrine, it is clearly recognized by all States that the concept of sovereign immunity is of judicial origin rather than of legislative enactment. While some States have codified the concept, many Courts are acknowledging that what Courts have given, they can likewise take away. In this regard, numerous States have abolished the further utilization of the doctrine of sovereign immunity by finding said defense to be at conflict with today's society, and a deprivation of Due Process and Equal Protection of the law as those principles are enunciated in the United States Constitution and the Constitutions of the various States of this Union. Within the past few years, the Courts of numerous States have abolished and overturned a century of contrary holdings. *See, e.g., Hicks v. State*, 544 P.2d 1133 (N.M. 1975); *Parish v. Pitts*, 429 S.W. 2d 45 (Ark. 1968); *Moliter v. Kaneland Community Unit District Number 302*, 164 N.E. 2d 89 (Ill. 1959); *Spanel v. Mounds View School District Number 621*, 118 N.W. 2d 795 (Minn. 1962); *Campbell v. State*, 284 N.E. 2d 733 (Ind. 1972). In each of said decisions, the Courts wrestled with the impact said holding would have upon the State and its political subdivisions, reviewed the common law development of the concept of sovereign immunity, and concluded that the further recognition of said defense to liability was in irreconcilable conflict with the Constitutional guar-

antees owing to all inhabitants of this country.

This Court has been consistently solicited to pass upon the propriety of the doctrine of sovereign immunity. At the present time, the cases of *Bruce v. Wichita State University* (Appeal Number 76-38, filed July 12, 1976); *Adams v. Harris County, Texas* (Appeal Number 75-1818, filed June 16, 1976); and *Wade v. Hankenberns* (Appeal Number 75-1637, filed May 10, 1976), are before this Court and involve, *inter alia*, a review as to the constitutionality of the immunity concept and statutes recognized in the States of Kansas, Texas, and Ohio respectively. However, unlike the above cases, the present petition presents to the Court the question of whether the continued enforceability of the doctrine of governmental immunity in the State of Georgia violates the plaintiff's equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution where the total distinction between plaintiff's possessing a right of recovery and being deprived of that right depends upon whether the airport from which plaintiff's decedent departed was owned, operated, and controlled by the City of Atlanta or by DeKalb County, Georgia. In the former, a municipality is not entitled to the protection of governmental immunity, while DeKalb County, considered a political subdivision of the State, is possessed of such defense.

The fortuitous circumstance that plaintiff's decedent landed at and departed from DeKalb-Peachtree Airport rather than Hartsfield International Airport (being the main air carrier airport in the City of Atlanta), but only a few miles apart, imposes an unjustifiable burden upon interstate commerce, and a deprivation of Plain-

tiff's equal protection rights. An air traveler would not be advised or recognize the peril with which he is faced in selecting the airport operated by DeKalb County rather than the one owned and operated by the City of Atlanta. In this day and time, when uniformity of governmental regulation is an objective to be achieved, and the acknowledgment of responsibility is a right to be preserved, the continued recognition and enforceability of governmental immunity in the field of air transportation and commerce results in the substantial deprivation of Plaintiff's constitutional rights under the statutes and laws of the United States.

Accordingly, Petitioner asks this Court to hold the application of sovereign immunity to be unconstitutional in the fields of air commerce and transportation, or in the alternative, to abrogate the doctrine of sovereign immunity in its entirety. In the case at bar, there exists liability insurance coverage purchased by DeKalb County, Georgia, covering the losses herein sustained, and purchased with monies from the coffers of the residents of said County which would protect DeKalb County, Georgia, from any assessment of damages hereinafter found to be owing.

PART III

In addition, this Court should grant the present Petition for Certiorari upon the basis that plaintiffs are entitled to maintain the present action as beneficiaries under the Grant Agreements between the United States of America and respondent herein.

The original panel in the Court of Appeals below, by a majority decision, determined that plaintiffs were intended beneficiaries under the Grant Agreements,

and that as such, they could maintain the present action against DeKalb County, Georgia. On rehearing, and rehearing en banc, the majority of the Court concluded that Federal law was applicable to the interpretation of Federal contracts, to wit, the six Grant Agreements here involved, and that as such, plaintiffs were not entitled to recover as beneficiaries thereof.

Petitioner contends that said holding is in direct conflict with the holding of the United States Court of Appeals for the Ninth Circuit, wherein said Court, in considering the precise statutory section here involved, as well as Grant Agreements issued pursuant thereto, concluded that residents of a neighboring city possessed standing to sue as third-party beneficiaries to Grant Agreements made between the United States and Los Angeles, California. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). Applying the guidelines announced by this Court in *Data Processing Service v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), the Ninth Circuit determined that the City of Inglewood was an intended beneficiary of the Grant Agreement, that Inglewood did have standing to sue and maintain said action, and that no statute precluded judicial intervention to resolve the subject dispute. The question of whether said Grant Agreement had in fact been breached and whether there existed administrative remedies to be exhausted was left for later determination by the District Court. Consequently, the holding of the Court below is in direct conflict with the holding of the Court in *Inglewood*.

Likewise, the opinion of the Court of Appeals is in conflict with the holding in *Town of New Windsor v.*

Ronan, 481 F.2d 450 (2nd Cir., 1973) wherein said Court confirmed that private causes of action may be based upon breaches of the Federal Airport and Airway Development Act and Grant Agreements entered thereunder.

While the foregoing holdings are in direct conflict with the opinion below, the landmark bird ingestion case, nearly identical to the case at bar, involved an Eastern Air Lines Electra which crashed into Boston Harbor shortly after takeoff, and as a result of ingesting into said plane's engines numerous birds which were maintained and permitted to exist at a garbage dump adjacent to the airport property. The Court in *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D. Pa. 1967), held that airport users are in fact and in law third-party beneficiaries of the type of Grant Agreements here involved, that airport users are entitled to sue the offending party for breach of the covenants contained in such Grant Agreements, and that a claim for relief may be based upon breach of the type of Grant Agreements presently before this Court.

The decisions in the foregoing citations were reached without serious consideration being given to whether Federal or State law was being applied. It is petitioner's position that irrespective of which law is utilized, a right of action does repose in petitioner.

It is significant to note that the United States Court of Appeals for the Fifth Circuit held in *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967) that black children who were not permitted to attend Bossier, Louisiana, public schools could sue as third-party beneficiaries under contracts between the United States and Bossier Parish School System. More partic-

ularly, the School Board promised to admit children of military personnel at the Army Base in the Parish to public schools on the same terms as they are available to other children in the school district. Actually, the Board required the children to attend segregated schools. The parents of the Negro children affected brought a class action suit to allow their children to attend integrated schools. One of the questions raised was whether the children had standing to sue. The Court found that they did and so stated. Consequently, the question before the Court is whether Federal Courts under the Act should develop a body of common law to interpret contracts resulting from the implementation of said Act, *see, Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), or whether the contract in question should be determined in accordance with the law of the State of Georgia. Further, irrespective of the conclusion reached as to the first inquiry, there remains to be resolved the issue of whether under the Federal Grant Agreements the widows and survivors of the deceased passengers are possessed of standing to sue on said contracts and Grant Agreements as third-party beneficiaries. Contrary to the opinion of the majority of the en banc Court below, this Court's holding in *United States v. Orleans*, ____ U.S.____, 96 S.Ct. 1971, 48 L. Ed. 2d 390 (1976) is not dispositive of the question before the Court. In said opinion, this Court noted that the plaintiffs had not sued the community action agency itself, but rather sought to impose liability upon the United States by virtue of a presumed master servant relationship. Inasmuch as the United States did not control the day to day operation of said agency, no such relationship was found to exist. Clearly, little stated in said opinion is of relevance to the present inquiry.

Accordingly, Petitioner seeks the exercise of this Court's discretion in granting a review as to the interpretation, applicability, and enforcement of the Grant Agreements entered into by the United States pursuant to its authorization as specified in the Act.

CONCLUSION

Petitioner here seeks to have this Court review the opinion and judgment of the Court below. In light of the substantial disparity between the opinion of the United States Court of Appeals for the Fifth Circuit and prior holdings of this Court and of other Courts of Appeal, Petitioner respectfully requests that this Court exercise its discretion and grant a review as to the merits of the claims herein asserted, and of Petitioner's standing to sue DeKalb County, Georgia, for the needless and unfortunate demise of her late husband. For the foregoing reasons, Petitioner respectfully requests that her Petition for a Writ of Certiorari be granted, and that the holding of the Court below be reversed.

Respectfully submitted,

ROSS & FINCH

A. Russell Blank
Claude R. Ross
Baxter H. Finch

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Brief by depositing a copy of same in the United States Mail with sufficient postage affixed thereto, addressed to each of the following:

MR. RONALD R. GLANCZ
Appellate Section, Civil Division
U. S. Department of Justice
Washington, D. C. 20530

MR. WILLIAM D. MALLARD, JR.
Assistant U. S. Attorney
Post Office Box 912
Atlanta, Georgia 30301

MR. F. CLAY BUSH
Long, Weinberg, Ansley & Wheeler
3000 The Equitable Building
Atlanta, Georgia 30303

MR. WENDELL K. WILLARD
Harvey, Rhodes & Willard
125 Trinity Place
Decatur, Georgia 30030

MR. J. ARTHUR MOZLEY
Smith, Cohen, Ringel, Kohler & Martin
2400 First National Bank Tower
Atlanta, Georgia 30303

This 8 day of November, 1976.

A. RUSSELL BLANK
Of Counsel for Petitioner

APPENDICES

APPENDIX A

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Parts Defendants-Appellees.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870 and 74-3881.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1976.

Persons injured, and representatives of persons killed, when a jet aircraft crashed after takeoff, allegedly because of ingestion in the jet engines of a large number of birds swarming over the airport and in adjacent county garbage dump, brought diversity damage actions against the county. The United States District Court for the Northern District of Georgia at Atlanta, William C. O'Kelley, found the county immune from suit and dismissed the actions, and plaintiffs appealed. After the judgment was reversed by a panel of the Court of Appeals, with one circuit judge dissenting, 526 F.2d 679, the court en banc granted rehearing and, although adopting the majority panel opinion in other respects, held, in agreement with the dissenting member of the panel, that federal law, not state law, controlled in determining whether plaintiffs were third-party beneficiaries under a contract between the county and the Federal Aviation Administration under which the county assured safe operation of the airport and surrounding properties controlled by it.

Affirmed.

Tjoflat, Circuit Judge, concurred and filed opinion.

Lewis R. Morgan, Circuit Judge, dissented and filed opinion in which Brown, Chief Judge, and Goldberg, Ainsworth, and Godbold, Circuit Judges, joined.

Brown, Chief Judge, dissented and filed opinion.

Courts 372(4)

Federal common law, not state law, applied in determining whether, in diversity damage actions brought for deaths and injuries which occurred when jet aircraft crashed after ingesting birds swarming over airport and adjacent county garbage dump, persons injured and representatives of persons thus killed were entitled to recover damages as third-party beneficiaries under contracts between county and Federal Aviation Administration under which county assured safe operation of airport and surrounding properties controlled by it; there being nothing in Federal Airport Act, under which county's agreement with FAA had been executed, or in agreement itself, to indicate intent to compensate members of public injured through use of airport, recovery under third-party beneficiary theory was unavailable under federal law. (Syllabus taken from dissent of Dyer, Circuit Judge, 526 F.2d at 686).

Appeals from the United States District Court Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

* Because of illness Judge Wisdom did not participate in the hearing or in the consideration of this case. Judge Thornberry was a

PER CURIAM:

The Court en banc adopts as its opinion Parts I, II, and IV of the majority panel opinion in this cause, 526 F.2d 679-686. The Court en banc adopts as its opinion the dissenting opinion of Judge Dyer, 526 F.2d 686-688 in lieu of Part III of the majority panel opinion. While not directly in point, the Court has reviewed the case of *United States v. Orleans*, ___ U.S. ___, 96 S.Ct. 1971, 48 L.Ed.2d 390. The reasoning of the dissenting opinion, adopted here, is remarkably consistent with the policy considerations noted by the Chief Justice in *Orleans*.

Accordingly, the judgment of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge (concurring).

I agree that, in general, government contracts, and especially those having to do with the airways, should be controlled by federal law. *See generally Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub nom., Forth Corp. v. Allegheny Airlines, Inc.*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 470 (1975). *See also* Federal Aviation Act of 1958, §1108(a), 49 U.S.C. §1508(a) (1970). I also agree that the public was not an intended third-party beneficiary of the contract assurances mandated by 49 U.S.C. §1110, *now enacted at* 49 U.S.C. §1718 (1970). Consequently, I concur.

LEWIS R. MORGAN, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, and GOLDBERG,

member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

AINSWORTH and GODBOLD, Circuit Judges, join (dissenting):

The court *en banc* adopts as its decision Parts I, II, and IV of the majority panel opinion, which held that under Georgia law plaintiffs could not recover against defendant DeKalb County under a theory of negligence,[1] of nuisance, or of waiver of immunity through the County's purchase of liability insurance. The majority *en banc* also adopts Judge Dyer's dissent in the original panel opinion in lieu of Part III of that same opinion. In Part III, the majority panel opinion held that under Georgia law plaintiffs could sue as third-party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. Through its adoption of Judge Dyer's dissent, however, the majority *en banc* holds that suit as third-party beneficiaries is likewise unavailable to plaintiffs and that, accordingly, their entire action was properly dismissed.

DeKalb County entered into an agreement with the FAA whereby in return for a grant of money by that agency, it gave the FAA certain assurances, among which were its promises that it would operate the airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. *Miree v. United States*, 5 Cir., 526 F.2d 679 at 686, n.12. The majority panel opinion held that under Georgia law plaintiffs could sue as third-

[1] While plaintiffs presented abundant evidence to make out a prima facie case of negligence against defendant in the operation of the DeKalb-Peachtree Airport, an analysis of applicable Georgia case law indicated that DeKalb County was immune from suit under a theory of negligence.

party beneficiaries for the County's alleged breach of its contractual duties.[2] Judge Dyer's dissent, which the court *en banc* now adopts, argued that federal common law, not Georgia law, should control the interpretation of third-party beneficiary rights under a contract entered into by the United States Government and other parties. We respectfully dissent.

I. Inapplicability of Federal Common Law.

After *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court held that in diversity cases [3] state law generally shall apply, it became clear that federal general common law no longer existed. Yet, with the much publicized *Clearfield Trust Co. v. United States*,[4] 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1973), it became clear that federal common law, as opposed to federal *general* common law, still lived. In *Clearfield*, a check drawn on the United States Treasurer payable to a named government employee was stolen and forged and the Clearfield Trust Company paid the check over the

[2] Specifically, through the County's continued operation of the county garbage dump, which lay adjacent to the airport, large numbers of birds swarmed over the airport and created allegedly hazardous conditions. It was the ingestion of a large number of these birds into the air intake system of the airplane's engine that allegedly caused the crash in question.

[3] Justice Brandeis' exact words were: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." 304 U.S. at 78, 58 S.Ct. at 822.

[4] Actually, on the same day that *Erie* was announced, Justice Brandeis held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938).

forged endorsement. In determining that federal common law, not state law, applied, the Supreme Court held that rights and duties of the United States on commercial paper that it issues should not be controlled by local law. That is, "the issuance of commercial paper by the United States is on a vast scale and transactions in that paper . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain." *Id.* at 367, 63 S.Ct. at 575. Hence, the rationale supporting the *Clearfield* decision is that when the rights and duties of the United States are to be determined, uniformity of result is desirable. *Accord, United States v. Standard Oil*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (indemnification of Government for injury to its soldier is matter of federal fiscal policy that demands uniform result).

It seems quite clear to us then that absent explicit Congressional command, federal common law should be chosen in a diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here, we have litigation between two non-federal parties over the rights of one as a third-party beneficiary to a contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit.[5] Such a question is a matter to be

[5] To the extent that the United States would have any interest in the outcome, its interest would favor recovery by the plaintiffs, in that the United States required the County to promise to maintain safe conditions at the airport. Unless the United States intended

decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third-party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of the United States [6] and involves no impact on a federal fiscal policy.[7]

We find our approach supported by analogous Supreme Court cases. In *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), a diversity case in which the United States was not a party, the Supreme Court held that in litigation between two private parties over negotiation of federal bonds, state law controlled. The words of Justice Frankfurter are particularly appropriate for the present case:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of the converter. *This is far too speculative, far too remote a possibility to justify the application of a federal law to transactions essentially of local concern.*

Id. at 33-34, 77 S.Ct. at 121. (Emphasis added.) Likewise, in *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), the Supreme Court held that state law applies to a case

---

this to be an empty promise by the County, one would assume that it would favor a result encouraging the keeping of this promise. See Section II, infra.

[6] *Clearfield Trust Co. v. United States, supra.*

[7] *United States v. Standard Oil, supra*

between two private parties involving the assignment of an oil and gas lease given by the United States through the Mineral Leasing Act for Acquired Lands. In rejecting the application of federal common law, the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern . . . .
>
> * * * * * *
>
> Finally, *it is said that because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.*

Id. at 68-71, 86 S.Ct. at 1304, 16 L.Ed.2d at 373-74 (emphasis added). We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and

Wallis, this case involves litigation between private parties over a matter in which the federal government has been somewhat involved, but in which no issue of the rights and liability of the government is being litigated and in which no federal interest demanding a uniform disposition is involved.[8]

In addition to these Supreme Court precedents, we feel that there are several policy considerations that favor application of state law over federal common law in this case. First, there is the important consideration of comity between the state and federal governments deemed so important in *Erie*. As the Supreme Court has stated: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. *The instances where we have created federal common law are few and restricted.*" *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605, 611 (1963) (emphasis added) (citation omitted). Here there exists a ready-made body of Georgia law on contract law, a subject well-disposed to adjudication through state law.[9]

---

[8] Indeed, the three cases cited by Judge Dyer for the proposition that federal common law should apply involved situations in which the United States was either seeking indemnity or was itself suing for damages on a contract made between it and another party. *See Miree v. United States*, *supra*, at 686. Hence, in these cases the United States did have an identifiable interest in the outcome of the case that demanded an application of federal common law.

[9] We note that in several instances, the Supreme Court has applied state law in a suit brought in federal court for the reason that the matter is one of particular state concern and one on which the state has already developed a large body of law. For example, in *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed. 2d 404 (1966), a suit brought by the United States to obtain payment of a loan made by the Small Business Administration, the Supreme

Second, we find the result in this case cruelly ironic in that through the application of federal common law, the majority preserves the County's immunity from suit by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. In view of the fact that the United States has enacted a complex scheme of federal aviation laws whose purpose is to promote air safety and that the Government in its contract with DeKalb County demanded assurances that the latter would maintain the airport in a safe condition, we cannot understand what federal purpose can possibly be served by conferring on DeKalb County greater immunity than its own state laws give it.

Finally, there is one other possible ramification of the case that could prove to be an unpleasant surprise for my brothers who join in the majority opinion: the expansion of federal jurisdiction. There was some concern that our holding in the original panel opinion expanded federal jurisdiction, that, carried to its logical conclusion, it would result in making a "federal case" out of a minor slip and fall accident at a county airport. The basis of that fear always seemed unclear, in that the present case is a diversity case, not a "federal question" case in which a particular holding could well expand

---

Court applied state law on the issue of the female defendant's disability to contract, noting that the state had developed a body of law on the issue in question and that, absent an overriding federal interest, the state's interest in the matter should be respected. *Id.* at 352, 86 S.Ct. at 507, 15 L.Ed.2d at 410. Although the jurisdictional basis for it was the existence of a federal question, *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S.Ct. 974, 979-80, 100 L.Ed. 1415, 1427-28 (1956), is in accord (state law, not federal law, determines the meaning of "children" under § 24 of the Copyright Act of 1947). We feel that the interest of the state in applying its own law governing third-party beneficiary rights is equally compelling.

federal jurisdiction.[10] Therefore, whether we had held that Georgia law did or did not render the County liable on a third-party beneficiary theory, the case was nevertheless a diversity case whose particular holding could not possibly expand or contract federal jurisdiction. Through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded. That is, "though the matter remains undecided by the Supreme Court, the better view is that a case 'arising under' federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such." *C. Wright, Law Of Federal Courts* 250 (2d ed. 1970). Since Mr. Wright's statement, the Supreme Court has held that claims founded on federal common law shall be construed as claims arising under the Constitution, laws or treaties of the United States, for purposes of federal question jurisdiction under 28 U.S.C. §1331. *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). Accordingly, it would seem that with this court's *en banc* decision there is now federal question jurisdiction over any claim made as a third-party beneficiary to a contract involving the United States—a result that gives a much broader jurisdictional base than the present diversity basis alone.

For the above reasons, we believe the original panel opinion applying Georgia law to the question should be affirmed.

---

[10] *E. g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

II. Third-Party Beneficiary Suits Under Federal Common Law.

While we do not believe that federal common law should apply in this case, we also dissent from the majority's holding that such federal law would preclude plaintiffs' suits as third-party beneficiaries. Judge Dyer cites the *Restatement (First) Of Contracts*, §145 (1932) and seven cases—none of which derives from either the Supreme Court or this circuit—for the proposition that members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated. *Miree v. United States*, *supra*, at 686-87. We contend that this authority is not persuasive in that the Restatement, now forty-four years old, antedates most of the major development of the third-party beneficiary doctrine and that the seven cases cited are inapplicable to the present case.[11] Two cases out of the Fifth and Ninth Circuits that are much closer to the present case sup-

[11] None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison-Knudsen Company*, 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States*, 279 F.Supp. 548 (D. Mont. 1968)—the courts were utilizing *Montana* third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.*, 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but, in any event, that case involved an incidental beneficiary. *Mahler v. United States*, 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third-party beneficiary action. Two cases that disallowed third-party suits—*Johnson v. Redevelopment Agency*, 317 F.2d 872 (9th Cir. 1963) and *Sayre v. United States*, 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States*, 468 F.2d 922, 199 Ct.Cl. 705 (U.S. Ct.Cl. 1972), denied a third-party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third-party beneficiary actions.

port our argument that federal common law should favor plaintiffs' recovery. In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), this court held that black children who were not allowed to attend the Bossier, Louisiana public schools could sue as third-party beneficiaries under a contract between the United States and the Bossier Parish school system. Specifically, the United States Department of Health, Education, and Welfare had administered grants of two million dollars to the Bossier Parish school system, for which the school system gave various promises in return, among them the assurance that children of parents stationed at Barksdale Air Force Base could attend the public schools; the black children discriminated against in *Bossier* were children of such parents. Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third-party beneficiary suit by plaintiffs.

In a case even closer factually to the present case, the Ninth Circuit held that plaintiff, an adjacent city to the defendant airport, had standing to sue as a third-party beneficiary to grant agreements made between an airport and the FAA. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). In that case, plaintiff, who alleged federal question grounds, sued for damages and injunctive relief arising from noise that resulted from operation of the Los Angeles International Airport. Reversing the district court in its holding that plaintiff could not sue as a third-party beneficiary in that it was not an intended beneficiary of the grant agreement, the Ninth Circuit examined the legislative history of 49 U.S.C.A. §1110(4) [now 49 U.S.C.A.

§1718(4)],[12] pursuant to which the grant agreement was executed, and found that flight safety was not the sole purpose of the section, but that the welfare of persons living close to airports was also to receive protection. The court stated:

> If Los Angeles made the assurances required . . . in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. *Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary.* The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.

Id. at 956 (emphasis added). Of course, the facts in the present case do involve flight safety, as opposed to noise disturbance, but the Ninth Circuit's discussion in Inglewood makes it quite clear that such safety was the primary object sought by the grant assurances. Just as in *Inglewood*, in this case, it was not for the benefit of DeKalb County nor for the benefit of the FAA that the government required the County to promise that it would maintain the airport in safe operating condition. Obviously, the only parties that the assurance could possibly have benefited were those members of the

---

[12] That section reads:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
>
> (4) appropriate action . . . has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft.

flying public who used DeKalb-Peachtree Airport. Accordingly, we contend that under federal common law plaintiffs were the intended beneficiaries of the grant agreement and should have been allowed to so sue.

III. Conclusion.

In summary, we feel that regardless of which law should be applied in this case, the result reached here is clearly incorrect. We have in this case plaintiffs suing a fully insured County against whom a strong prima facie case of negligence and breach of contract have been made. Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third-party beneficiaries to the grant agreement between the United States and DeKalb County.[13] We feel that the same result should obtain under application of federal common law. Yet, the majority applies a federal common law narrower in its allowance of recovery than Georgia law, the forum that should have the greater interest in determining whether its county should be immune from suit. In the face of a contract provision enacted at the insistance of the United States that requires DeKalb County to maintain a safe airport and of an extensive scheme of federal aviation laws whose purpose is to encourage safe airport operations, we cannot understand what federal interest is served by overruling Georgia law to defeat an action by these plaintiffs. We respectfully dissent.

JOHN R. BROWN, Chief Judge (dissenting):

I join in Judge Morgan's fine dissent. I have reservations about part I but these are not decisive of this case.

---

[13] *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973).

I emphasize that I believe federal, not state, law controls. This is an area in which there is a need for that consistency which can only be provided by uniform national standards—a consistency, in short, which requires the application of federal construction of federal contracts. Like Judge Morgan, however, I believe that federal law not only does not preclude the plaintiffs below from recovering as third-party beneficiaries but that federal law compels this result.

To assert that Congress, in enacting 49 U.S.C.A. §1718(4), meant for contracts between the FAA and airports to benefit that countless multitude of taxpayers and land-locked citizens and to exclude those of the flying public—including peripatetic Judges whose airborne safety is central to them—is to say Congress was incongruous. Who else but the flying public—with or without life tenure (which after all lasts for this life only)—were they thinking of? The proof of the pudding, as this record indicates, is that the Federal Government, disturbed about the presence of garbage fed fowls, sought and obtained from the District Court an injunction against the continuance of this menace. In what name was this remedy invoked—in the name of the safety of the air traveling public. If the Government could, should, and did protect them from this hazard to their very temporal existence, how in the name of legalese can we conclude that the contract did not mean that fliers—or unfortunately, their successors, assigns, widows and orphans—while protected in a general sense, were not to be entitled to the only redress an aggrieved survivor has for such a contractual dereliction?

APPENDIX B

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.
DEKALB COUNTY, GEORGIA,
Defendant-Appellee,
v.
MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee,
DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee,
DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870 and 74-3881.

United States Court of Appeals, Fifth Circuit.

Jan. 30, 1976.

Persons injured, and representatives of persons killed, when a jet aircraft crashed after takeoff, allegedly because of ingestion in the jet engines of a large number of birds swarming over the airport and an adjacent county garbage dump, brought diversity damage actions against the county. The United States District Court for the Northern District of Georgia, at Atlanta, William C. O'Kelley, Judge, found the county immune from suit and dismissed the actions, and the plaintiffs appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that the county was immune from suit on theories of negligence or maintenance of a nuisance, but that it was not immune from liability on a theory that plaintiffs were third-party beneficiaries to a contract between the Federal Aviation Administration and the county under which the county agreed to operate the airport safely.

Reversed.

Dyer, Circuit Judge, dissented and filed opinion.

1. Counties 143

Under Georgia law, county was immune from suit for property damage and personal injuries and death occurring when jet aircraft crashed shortly after takeoff because of ingestion of large number of birds swarming over airport and adjacent county garbage dump, to extent that suits were founded on theory that operation of garbage dump continued with knowledge of presence of birds and their interference with aircraft on prior occasions, and was therefore negligent. Code Ga. §§11-201 et seq., 23-1502, 69-301, 72-103.

2. Counties 141

Georgia statute, providing that if public nuisance causes special damage to individual, such special damage shall give right of action, does not create statutory exception to general rule of county immunity; rather, statute's function is to create cause of action for particular type of nuisance. Code Ga. §§23-1502, 72-103.

3. Counties 143

Under Georgia law, county was immune from liability under theory of nuisance for personal injuries, death and property damage occasioned when jet aircraft crashed shortly after takeoff from airport due to ingestion in jet engines of large number of birds swarming over airport and adjacent county garbage dump. Code Ga. §§23-1502, 69-301, 72-102, 72-103, 105-103; Const. Ga. art. 1, §3, par. 1.

4. Counties 208

Under Georgia law, if statute authorizes county to contract, it also implicitly creates cause of action for

breach which is not barred by statute conferring county immunity. Code Ga. §23-1501.

5. Contracts 187(1)

Under Georgia statute permitting actions on contracts by third-party beneficiaries, such actions are limited to intended beneficiaries, as distinguished from incidental beneficiaries. Code Ga. §3-108.

6. Contracts 187(1)

Under Georgia law, contract with public body confers benefit on public if it is clear from appropriate contractual provisions that parties intended those provisions to benefit public. Code Ga. §3-108.

7. Counties 208

Under Georgia law, county was not immune from suit for personal injuries, death and property damage occurring when jet aircraft crashed after ingestion in jet engines of birds flying over county garbage dump adjacent to airport, to extent that suit sought recovery by plaintiffs as third-party beneficiaries under contract between county and Federal Aviation Administration under which county assured safe operation of airport and surrounding properties controlled by it. Code Ga. §§3-108, 23-1501.

8. Counties 141
Insurance 608.1

Under Georgia law, purchase of liability insurance by county, even if policy contains explicit clause prohibiting insurance company from pleading immunity of county, neither waives immunity of county from suit

nor creates direct action against insurer. Code Ga. §23-1502.

9. Counties 141

To extent county was otherwise immune from suit, purchase by county of liability insurance policy created no cause of action against it. Code Ga. §23-1502.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

On February 26, 1973, a Lear Jet crashed shortly after take-off from the DeKalb-Peachtree Airport. The alleged cause of the crash was the ingestion of a large number of birds swarming over the airport and adjacent county garbage dump. Damage was substantial; all passengers were killed, the plane was destroyed, an individual on the ground was severely injured by burning jet fuel that fell from the disabled plane shortly before crashing, and property at the crash site was extensively damaged. Separate actions were brought by the passengers' survivors,[1] the burn victim,[2] the owner of the plane,[3] and the owner of the property at the crash site.[4] The various plaintiffs, suing in diversity, asserted

[1] In No. 74-3670, George Henson Miree, Claude Estes Miree, and Dorothy Estes Miree sue as survivors to their parents, Mr. and Mrs. Richardson F. Miree. In No. 74-3822, Judith Anita Phillips sues as survivor to her husband, David E. Phillips.

[2] No. 74-3864, *William Michael Fields v. DeKalb County, Georgia.*

[3] In No. 74-3870, Fireman's Fund Insurance Co. sues as assignee to Southeast Machinery's claim for destruction of the Lear Jet.

[4] No. 74-3881, *Pearlie Chaisson v. Southeast Machinery, Inc.*

theories of negligence, nuisance, and breach of contract. Defendant DeKalb County moved to dismiss on grounds that it was immune from suit under Georgia Law. Defendant's motion was granted, and the plaintiffs appealed.

I.

[1] The plaintiffs present a prima facie case of negligence that would certainly survive a motion to dismiss in the absence of any immunity question. The essence of their claim is that large numbers of birds had flocked around the garbage dump adjacent to the airport for a considerable period of time, that the county was aware of the bird problem prior to the crash, and that birds had interfered with planes on prior occasions. All this, of course, is to no avail if counties are immune from being sued in negligence. Relying heavily on three cases, the plaintiffs contend that counties are not immune from negligence suits. First, they argue that the Uniform Airports Law (UAL)[5] was held to constitute a statutory waiver of *municipal* immunity in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), a case involving airport negligence. Next, they cite *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), for the proposition that suits may be maintained against counties for breach of contract under the UAL, because operation of an airport is a proprietary function. Finally, they tie up the argument with a quotation from *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961), to the effect that for immunity purposes there is no distinction between municipalities and counties in cases involving airports authorized under the UAL. We must conclude, how-

[5] Ga. Code Ann. § 11-201 *et seq.*

ever, that when read in context of the surrounding case law and statutory framework, these cases stand for much narrower propositions.

An examination of the statutory bases of immunity for counties and municipalities reveals distinctly different provisions. County immunity is provided for in Ga. Code Ann. §23-1502. "A county is not liable to suit for any cause of action unless made so by statute." While almost as succinct in its language, the provision for municipal immunity in Ga. Code Ann. §69-301 is not nearly so unequivocal. "Municipal corporations shall not be liable for a failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

The operational distinction between these statutes has long been recognized by the Georgia courts. The second sentence of the municipal immunity statute has been consistently read to waive immunity whenever a municipality undertakes a proprietary function. Thus, in *Ware County v. Cason*, 189 Ga. 78, 79, 5 S.E.2d 339 (1939), the Georgia Supreme Court held a county hospital immune to suit even though prior cases had found no immunity for city hospitals.

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. Code, §69-301; *Cornelisen v. Atlanta*, 146 Ga. 416 (91 S.E. 415). But there is no such statute relating to counties and no statute making

> a county liable to suit for tort based on negligence in operating a hospital causing injury to a pay patient therein.

Accord, *Purser v. Dodge County*, 188 Ga. 250, 251-52, 3 S.E.2d 574 (1939).

It follows that the requirements for resisting immunity in cases involving municipal and county airports is significantly different. To sue a municipal airport, a plaintiff need only show that the operation of a municipal airport is a proprietary function; to sue a county airport, a plaintiff must show an express statutory waiver of immunity. When read in light of this distinction it becomes apparent that the extensive discussion of the UAL in *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1952), was not intended to demonstrate that the statute waived immunity. Rather, the intent was to demonstrate that, despite language in the UAL which could have been read to say that the operation of airports is a governmental function, the operation of an airport is a proprietary function, and, accordingly, is susceptible to suit.

In *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), the court made considerable use of the proprietary function discussion in *Caroway*, but not, as suggested by the plaintiff, for the purpose of finding either that the UAL constitutes a statutory exception or that the county participation in a proprietary function waives immunity. Rather, the purpose of the court's inquiry into whether the operation of an airport constituted a proprietary function was to fit this case within the framework of a line of Georgia cases that allow County Commissioners to enter into binding contracts extending beyond their term of office only if

the contract relates to a proprietary function of the county. *Id.* at 854-855, 118 S.E.2d 234.

On motion for rehearing the court in *Southern Airways* clarified its position as to the county's lack of immunity from suit on the contract. The court ruled that since the UAL expressly authorizes the county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach. *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Finally, an examination of *Taylor v. King*, 104 Ga. App. 589, 122 S.E.2d 265 (1961), reveals that the language relied upon by the plaintiffs was taken out of context. The *Taylor* case involved alleged negligence by a municipal airport. Accordingly, it was necessary for the plaintiffs to demonstrate that operation of the airport was a proprietary function to avoid immunity. Relying on the *Caroway* and *Southern Airways* cases, the court concluded that the operation of this municipal airport was a proprietary function. In the course of its discussion of the *Southern Airways* case the court said: "For this purpose, there is no distinction between municipal and county liability." The antecedent to which "this purpose" refers is not, however, determination of immunity, as suggested by the plaintiffs, but only determination of whether or not an airport is a proprietary function.[6] An examination of the Uniform

[6] *See also, City of Macon v. Powell*, 133 Ga. App. 907, 908, 213 S.E.2d 63 (1975).

Airports Law reveals no language that even vaguely suggests that the legislature intended to waive county immunity for negligence in the operation of airports. Having been cited no other statutory authority, we necessarily must conclude that the county is immune from suit on theory of negligence.

II.

The second theory propounded by the plaintiffs is that the county is liable for special damages resulting from the maintenance of a nuisance. The district court overruled this theory, holding that in the absence of statutory authority to be sued, the county is immune under Ga. Code Ann. §23-1502. In response, the plaintiffs assert that the requisite statutory authority to sue exists in Ga. Code Ann. §72-103.

> Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public did not participate, said special damage shall give a right of action.

In addition, they cite several Georgia cases holding a county liable for maintenance of a nuisance.

[2] Although several Georgia cases have held either a municipality or a county liable for a nuisance, none has cited §72-103 as its authority for not holding the county immune. We could read this statute to create an exception to immunity only if we read "public nuisance" to mean a nuisance created or maintained by a public body. Ga. Code Ann. §72-102, however, defines public and private nuisance in terms of who is affected and who is injured, not in terms of the perpetrator of the nuisance. Thus, it must be concluded, that §72-103 does

not create a statutory exception to the general rule of immunity. Rather, its function, like several comparable Georgia statutes,[7] is to create a cause of action for a particular kind of wrong.

There are, nevertheless, circumstances under which a county may be sued in nuisance. In both *Nalley v. Carroll County*, 135 Ga. 835, 70 S.E. 788 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196, 154 S.E.2d 203 (1967),[8] counties were held liable for flood damage caused by a county public works project. Neither case, however, made clear its basis for finding the counties susceptible to suit. In *Baranan v. Fulton County*, 232 Ga. 852, 209 S.E.2d 188 (1974), the Georgia Supreme Court clarified the situation. The counties were not immune in those cases because Article 1, §3, para. 1 of the Georgia Constitution[9] provides that private property shall not be taken for public purposes without just and adequate compensation. The effect of the flooding was to take the plaintiffs' land for public purposes, thus creating an action for compensation under the Constitution, and accordingly, an exception to §23-1502.[10]

[3] The injuries that occurred to the plaintiffs in the present case do not parallel those of the plaintiffs in *Baranan*, *McFarland*, or *Nalley*. In those cases land was rendered useless as the incidental result of a public project; the taking was an inevitable result of the public project, and the county knew or should have known that

---

[7] *See, e. g.*, Ga. Code Ann. § 105-103 which creates a cause of action for an ordinary tort.

[8] *See also*, later opinions in the *McFarland* case at 224 Ga. 618, 163 S.E.2d 827 (1968); 226 Ga. 321, 175 S.E.2d 20 (1970); 231 Ga. 649, 203 S.E.2d 495 (1974).

[9] Ga. Code Ann. § 2-301.

[10] *Accord Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975).

flooding would occur. The action was for compensation for land, the taking of which was necessary to the completion of the project. In this case, the injury to property resulting from the air crash is not a necessary and foreseeable consequence of maintaining a garbage dump and, consequently, not comparable to the flooding that results from river and drainage projects. Thus, we must conclude that there is no statutory exception under which these plaintiffs may sue the county for nuisance.

We reach this conclusion despite a line of cases that hold municipalities liable for personal injuries resulting from a continuing nuisance. *Town of Ft. Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940); *City Council of Augusta v. Cleveland*, 148 Ga. 734, 98 S.E. 345 (1919); *City of Gainesville v. Pritchett*, 129 Ga. App. 475, 199 S.E.2d 889 (1973)[11] These cases allow municipalities to be held liable in nuisance despite §69-301. While the cases do not explain why the municipalities are not immune, it is clear from several opinions that it is not because they fall within the exception for proprietary functions. Instead, this line of cases must be read to be a common law exception to the general statutory rule expressed in §69-301 that municipalities are immune. Such an exception cannot be created for counties, because §23-1502 explicitly requires that exceptions to immunity be created by statute. In accord with this reading of *Town of Oglethorpe v. Phillips, supra*, is *Sheley v. Board of Public Education for City of Savannah and County of Chatham*, 132 Ga.App. 314, 317-18, 208 S.E.2d 126 (1974), *aff'd*, 233 Ga. 487, 212 S.E.2d 627 (1975), in which the Georgia Court of Ap-

[11] *See also* Annot., 34 A.L.R.3d 1008, 1044-49 (1970).

peals declined to apply the immunity exception of the *Ft. Oglethorpe* case to cases in which governmental subdivisions other than municipalities were sued in nuisance. See also, *Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975). Accordingly, we hold that these cases do not create a cause of action in nuisance against counties.

III.

[4] Finally, the plaintiffs seek to sue the county as third-party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. That contract provided for, among other things, the safe operation of the airport and surrounding properties controlled by the county. The district court rejected this claim, holding that counties are immune from suit for breach of contract. In support of that conclusion they cite *Purser v. Dodge County*, 188 Ga. 250, 3 S.E.2d 574 (1939). That case, however, never reached the question. "The question certified does not involve a determination as to whether a county would be liable on a contract which the law might expressly or impliedly authorize it to make." *Id.* at 253, 3 S.E.2d at 575. It is now a well settled proposition of Georgia law that if a statute authorizes a county to contract, it also implicitly creates a cause of action for breach. Since the action against the county is authorized by statute, it is not barred by §23-1501. *Hancock County v. Williams*, 230 Ga. 723, 724, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966); *Decatur County v. Praytor, Howton and Wood Contracting Company*, 163 Ga. 929, 933-34, 137 S.E. 247 (1927); *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865, 118 S.E.2d 234 (1960) (on motion for rehearing). Since it is clear that DeKalb

County may be sued for breach of contract, the only remaining question is whether the plaintiffs may sue as third-party beneficiaries to the contract between DeKalb County and the FAA.

[5] Actions on contracts by third-party beneficiaries are explicitly provided for by Ga. Code Ann. §3-108 ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract." The case law interpreting this statute has, however, limited its application to intended beneficiaries, as distinguished from incidental beneficiaries. Compare *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga.App. 849, 851-52, 209 S.E.2d 264 (1974), with *Stewart v. Gainesville Glass Co.*, 131 Ga.App. 747, 752-53, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975). A typical situation under which a third-party beneficiary cannot sue is presented by *Lee v. Petty*, 133 Ga.App. 201, 210 S.E.2d 383 (1974). In that case the plaintiffs attempted to sue Ware County under a contract between the county and a leasing company that required the county to obtain liability insurance. Merely because the plaintiffs would benefit from the existence of an insurance policy was not sufficient. The court held that "[w]ithout question there was no contemplation that the appellants [would] be beneficiaries under the terms of the contract and hence there is no basis for their recovering under this case." *Id.* at 206, 210 S.E.2d at 386. Since the purpose of the insurance clause was not to protect the public, but to determine responsibilities and liabilities between the parties, injured members of the public could not sue.

[6] The remaining question, therefore, is whether the

safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public. The county argues that such a showing is not sufficient; not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach. Under Georgia law, however, it is well settled that a contract with a public body confers a benefit on the public if it is clear from the appropriate contractual provisions that the parties intended those provisions to benefit the public.

In *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965), the defendant had entered into a road building contract with the state of Georgia. Included in that contract was an agreement that the defendant would "provide all safeguards, safety devices, and protective equipment and take any other needed actions, on his own responsibility or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the public . . ." *Id.* at 239, 141 S.E.2d at 324. The plaintiff in that case alleged that the defendant was negligent in carrying out his contractual obligation to provide for the safety of the public, and that this negligence had resulted in the plaintiff's injury. The court held that the plaintiff could sue for this breach. "A contract between the State Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the work inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240, 141 S.E.2d at 324. Accord *M. R. Thomason and Associates, Inc. v. Wilson*, 125 Ga.App. 658, 661-62, 188 S.E.2d 805 (1972). The

court did not discuss whether the parties contemplated creating a cause of action for the public. The mere creation of a contractual duty for the public's benefit necessarily created a cause of action in the public for its breach.

[7] The situation and contracts presently before the court are quite similar to those in the construction cases. DeKalb County's contract with the FAA provides that the county will operate the airport for the use and benefit of the public, will operate and maintain it in a safe and serviceable condition, and will limit use of adjacent land so that it will not interfere with the safe use of the airport.[12] The county breached this contractual duty, and as a result of that breach the plaintiffs were injured. We hold that these contractual provisions inured to the benefit of the public, and, accordingly, the plaintiffs may sue for breach.

IV.

[8, 9] Some of the plaintiffs also argue that the purchase of an insurance policy by the county creates a cause of action. Georgia law, however, has consistently held that the purchase of liability insurance by a county, even if the policy contains an explicit clause prohibiting the insurance company for pleading the immunity of the county, neither waives the immunity of the county from suit, nor creates a direct action against the insurer. *Arnold v. Walton*, 205 Ga. 606, 611-14, 54 S.E.2d 424 (1949); *Revels v. Tift County*, 235 Ga.

---

[12] *See* Project Application, Sponsor's Assurances, paragraphs 2, 6, 7, and 13 (appearing in the appendix of No. 74-3870, *Fireman's Fund Insurance Co. v. United States*, at 80-81). The Project Application is incorporated into the Grant Agreement by reference (appearing in Appendix, *supra*, at 62).

333, 335, 219 S.E.2d 445 (1975); *Lee v. Petty*, 133 Ga. App. 201, 205-06, 210 S.E.2d 383 (1975).

In conclusion, we hold that DeKalb County is susceptible to suit on theory of breach of contract and that all of the plaintiffs may sue as third-party beneficiaries to the contract between DeKalb County and the FAA. All other actions are barred by the immunity of the county. Accordingly, we reverse.

DYER, Circuit Judge (dissenting):

Although I agree with the majority's conclusion that DeKalb County is immune from suit for negligence and nuisance, I disagree with their conclusion that the county can be held liable by plaintiffs as third-party beneficiaries of the Federal Grant Agreement between the United States and the county. At most, plaintiffs are incidental beneficiaries of that agreement, not entitled to recover for breach of contract.

At the outset, the majority errs by looking to Georgia law in determining whether plaintiffs are third-party beneficiaries.[1] Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger*, 1970, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d

[1] Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries, may recover for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries.

224; *Smith v. United States*, 5 Cir. 1974, 497 F.2d 500; *First National Bank v. Small Business Administration*, 5 Cir. 1970, 429 F.2d 280.[2]

Federal cases considering the question of when members of the public at large are third-party beneficiaries of a contract to which the United States is a party are few in number. However, those cases support the position of the Restatement of Contracts, §145, that such members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated.[3] *West v. Morrison-Knudsen Company*, 9 Cir. 1971, 451 F.2d 493 (Injured employee of subcontractor is not third-party bene-

---

[2] As stated in *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838:

> The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Even though we are here considering the liability of parties other than the United States, this same consideration controls, for if plaintiffs are third-party beneficiaries with respect to the obligations of the county under the contract, then they would also be third-party beneficiaries with respect to the obligations of the United States.

[3] Restatement of Contracts, §145, provides in pertinent part:

> A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

ficiary of safety provisions of prime contract between United States and general contractor); *Hensley v. United States*, D.Mont. 1968, 279 F.Supp. 548 (same); *Brotherton v. Merritt-Chapman & Scott Corp.*, 2 Cir. 1954, 213 F.2d 477 (provision in contracts requiring contractors to cooperate with one another was for benefit of government, and contractor could not recover from another as third-party beneficiary of that provision). *See also Johnson v. Redevelopment Agency*, 9 Cir. 1963, 317 F.2d 872; *Mahler v. United States*, 3 Cir. 1962, 306 F.2d 713; *Housing Corp. of America v. United States*, Ct. of Claims 1972, 468 F.2d 922, 199 Ct.Cl. 705; *Sayre v. United States*, N.D. Ohio 1967, 282 F.Supp. 175. It is not enough that the contract confer a benefit on the public at large.

Plaintiffs claim they are third-party beneficiaries of certain broad assurances made by the county and contained in the grant agreement, to the effect that the county will operate the airport safely and will control surrounding airport hazards.[4] However, these contract assurances appear to be nothing more than the assur-

---

[4] These assurances provide in pertinent part:

> The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes.
>
> In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, . . .
>
> Insofar as is within its power to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

ances required by 49 U.S.C.A. §1110.[5] I can find nothing in the language of the contract or the legislative history of 49 U.S.C.A. §1110 to indicate that the purpose of these assurances was to create a cause of action on behalf of injured third-parties. In fact, the only remedy provided in the grant agreement for breach of these assurances is termination of the grant by the United States. As in *United States v. Mahler, supra,* it appears that the only purpose of these assurances was to make sure that federal funds were effectively employed and not wasted.

Other courts, in considering third-party claims under the Federal Airport Act, 49 U.S.C.A. §1101 et seq., and the various agreements and assurances entered into pursuant to that act, have concluded that, although the act might incidentally benefit users of airports, both airlines and passengers, the primary purpose of the act was to establish a nationwide system of public airports adequate to meet the present and future needs of civil aviation. *Port of New York Authority v. Eastern Air Lines, Inc.*, E.D.N.Y. 1966, 259 F.Supp. 745; *San Francisco v. Western Air Lines, Inc.*, 1962, 204 Cal. App.2d 105, 22 Cal.Rptr. 216; *Eastern Air Lines v.*

---

[5] 49 U.S.C.A. §1110 provides in pertinent part:

> As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that
>
> * * * * *
>
> (2) such airport and all facilities thereon or connected therewith will be suitable operated and maintained, with due regard to climatic and flood conditions;
>
> (3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

Town of Islip, 1962, Sup., 229 N.Y.S.2d 117. There is nothing to indicate an intent to compensate members of the public injured through the use of the airport.

The majority finds that "not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach." I find no support for the second conclusion. It is based not on the language of the contract or the legislative history, but merely on a relatively few state cases which, as outlined above, are not controlling. I am unwilling to create a cause of action based on such a thin thread. I would therefore affirm the judgment of the district court.

APPENDIX C

[Filed in Clerk's Office Sept. 25, 1974,
Ben H. Carter, Clerk; By: P.J.E., Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUDITH ANITA PHILLIPS, widow of David Emanuel Phillips, deceased, *Plaintiff*,	
vs.	
UNITED STATES OF AMERICA, *Defendant and Third-Party Plaintiff*,	CIVIL ACTION NO. 19412
vs.	
MACHINERY BUYERS CORP. and SOUTHEAST MACHINERY, INC., *Third-Party Defendants.*	

ORDER

This action was brought by Judith A. Phillips against the United States of America and DeKalb County, Georgia, for the death of her husband. The United States has filed a third-party claim against Southeast Machinery, Inc. and Machinery Buyers Corporation pursuant to Fed.R.Civ.P. 14. In a prior order of this Court, *Phillips v. United States*, Civ. No. 19412 (N.D. Ga., June 27, 1974), DeKalb County was dismissed as a party defendant for plaintiff's failure to state a claim. Fed.R.Civ.P. 12(b)(6). This court rested its decision upon DeKalb County's governmental immunity from suit. The case is now before the court on the motion of third-party defendants Southeast Machinery, Inc. and

Machinery Buyers Corporation to reconsider this ruling.

Briefly stated, the case arises out of an aircraft crash which occurred shortly after takeoff from the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard the aircraft were killed, including plaintiff's decedent. The complaint alleges that numerous birds swarmed over the airport and adjacent garbage dump maintained by DeKalb County, and that the turbine engines of the aircraft ingested a large number of these birds resulting in the sudden loss of power in both engines and the crash of such aircraft. Based upon these allegations, plaintiff claimed that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It was further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and that plaintiff as a third-party beneficiary may recover for DeKalb County's breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public. To these claims DeKalb County filed a motion to dismiss, which this court granted. Although various arguments were raised by the parties, the court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. *See Seymore v. Elbert County*, 116 Ga. 371 (1902). Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." Consistent with this statute, the Georgia courts have

required parties filing suit against a county to show the appropriate statutory authority allowing a claim. As was stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. Notwithstanding this interpretation, the movants, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), *Taylor v. King*, 104 Ga.App. 589 (1961), and *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850 (1960), urge this court to adopt the view that a county can be held accountable when acting in a proprietary capacity such as DeKalb County's operation of the DeKalb-Peachtree Airport. Although the court sympathizes with this view, it cannot so read the cited cases. Both *Caroway* and *Taylor* involved suits against municipalities which have distinctive liabilities not applicable to counties. *Ware County v. Cason*, 189 Ga. 78 (1939). This distinctive liability is set forth in Ga. Code §69-301 which provides that municipalities shall be liable for "improper or unskillful performance of their ministerial duties. . . ." *See generally Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). Neither the statutes or Georgia courts have made such a distinction between governmental and proprietary functions with respect to a county's liability under facts such as are presented here. As was clearly stated in *Ware County v. Cason*, 189 Ga. 78, 79 (1939):

> There is a statute which, on the basis of distinction between governmental functions of municipal

> corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. (citations omitted.) But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital. . . .

Movants further argue that in *Southern Airways* the Georgia court is moving away from the traditional doctrine of governmental immunity. The court cannot agree. *c.f. Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *see Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp. 1974). Although there is some language in *Southern Airways* which supports this position, the case involved merely a declaration of rights of the parties under a lease agreement. This is a reiteration of the rule set out in *Decatur County v. Prayton, Howton & Wood Contracting Co.*, 163 Ga. 929 (1927), that

> [w]henever a county . . . is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability . . . although there is no statute authorizing the bringing of an action for such purpose.

Id. at 934.

This court also finds that movants' reliance upon *DeKalb County v. McFarland*, 223 Ga. 196 (1967), is misplaced. *McFarland* fell within the Georgia constitutional provision holding a county liable for damage to private property taken for public uses, *see* Ga. Code §2-301; *Smith v. Floyd County*, 85 Ga. 420 (1890), and

is distinguishable. Accordingly, the court reaffirms its prior holding that plaintiff's claim of damages resulting from the alleged nuisance fails to set forth a claim against DeKalb County. *State Highway Department v. Barrett*, 124 Ga.App. 703 (1971); *Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp. 1974).

For the foregoing reasons, the motion of Southeast Machinery, Inc. and Machinery Buyers Corporation to set aside the prior order dismissing DeKalb County having been considered, it is hereby DENIED.

Inasmuch as the question of DeKalb County's liability to suit involves a controlling question of law upon which the respective liabilities of the parties rest, and there appear to be substantial grounds for differing opinions, an immediate appeal from this order will materially advance the ultimate determination of the litigation. For this reason, the court sees no just reason for delay and directs the Clerk to enter final judgment dismissing DeKalb County from this case.

IT IS SO ORDERED this 24th day of September, 1974.

/s/ WILLIAM C, O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX D

[Filed in Clerk's Office June 27, 1974,
Ben H. Carter, Clerk; By: J.W.E., Deputy Clerk.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUDITH ANITA PHILLIPS, Widow of David Emanuel Phillips, deceased vs. UNITED STATES OF AMERICA and DeKALB COUNTY, GEORGIA	CIVIL ACTION NO. 19412

ORDER

This action was brought by Judith A. Phillips against the United States of America and DeKalb County, Georgia for the death of her husband, David E. Phillips. Jurisdiction exists in the action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b),[1] and in the action against DeKalb County pursuant to 28 U.S.C. §1332.[2] The case is now

[1] 28 U.S.C. § 1346(b) provides in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or admission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2] 28 U.S.C. § 1332 provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 . . . and is between—(1) citizens of different states. . . ."

before the Court upon the United States' motion for leave to file a third-party complaint and a motion to consolidate this action with the case of *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), presently pending in this Court. Also before the Court is DeKalb County's motion to strike portions of the complaint and to dismiss the plaintiff's claims against it. Fed.R.Civ.P. 12(f) and 12(b)(6).

The case arises out of an aircraft crash which occurred shortly after takeoff and approximately two miles southwest of the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard were killed, including plaintiff's decedent, who was employed as a co-pilot aboard the aircraft. A short time after the crash, there were found the remains of several dead birds near the end of the airport runway from which the aircraft departed. Also discovered were numerous birds swarming over the airport and the adjacent garbage dump, maintained by defendant DeKalb County. The complaint alleges that the turbine engines of the aircraft ingested a large number of these birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft. The plaintiff claims that the United States, through its agency, the Federal Aviation Administration, and defendant DeKalb County, knew of the existing bird hazard at the airport, in that, such bird hazard had existed for a substantial period of time prior to the crash. Notwithstanding this knowledge, defendants failed to warn and notify jet pilots of the dangerous and unsafe bird hazard that was in existence and negligently failed to take adequate precautions and safeguards to prevent birds from contacting flying aircraft. Based upon these allegations, the plaintiff claims

that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It is further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and that plaintiff as a third-party beneficiary may recover for breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public.

I. MOTION TO CONSOLIDATE

The defendant United States has moved the Court pursuant to Fed.R.Civ.P. 42(a)[3] to consolidate the instant action with *Miree v. United States*, Civ.No. 19293 (N.D. Ga., filed Nov. 5, 1973), for purposes of discovery and trial on the issue of liability. Both cases involve questions concerning the open garbage dump at the airport, the operation of the airport, certain formal agreements between the United States (FAA) and DeKalb County concerning operation of the airport, the bird hazard at the airport, and the crash of the Lear jet on February 26, 1973. Nevertheless, plaintiff has objected to consolidation for trial purposes because of possible prejudice to her case. Plaintiff does not object to consolidation for discovery purposes.[4]

---

[3] Fed.R.Civ.P. 42(a) provides:

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

[4] There is now pending in this Court five additional cases related to the Lear Jet crash near DeKalb-Peachtree Airport on February 26, 1973: (1) *United States of America v. A. C. Guhl*, Civ. No. 17968 (N.D. Ga., 1973), which involves an attempt by the United States to prohibit DeKalb County from continuing to maintain a hazard near an airport in the form of a garbage dump; (2) *Miree*

Based upon a full consideration of both cases, the Court concludes that it will follow its normal procedure of deferring decision on consolidation for trial purposes until the pretrial conference of this case. In this manner, the Court can be more fully aware of the effect such a ruling will have and whether it will best serve the convenience of the parties and the Court by eliminating unnecessary repetition of evidence. This procedure also insures that the rights of the parties will not be prejudiced by a premature order of consolidation. *See generally Dupont v. Southern Pacific Co.*, 366 F.2d 193 (5th Cir. 1967), *cert. den.* 386 U.S. 958 (1967). The Court does believe though, that since there are common questions of law and fact involving liability in both cases, and no objection appearing, consolidation will be ordered for purposes of discovery and other pretrial matters.

II. MOTION TO ADD A THIRD-PARTY COMPLAINT

The United States has moved this Court for leave to file a third-party complaint against Machinery Buyers Corporation and Southeast Machinery, Fed.R.Civ.P. 14(a). In support of the motion it is claimed that if the United States is found liable for all or part of the claims asserted by the plaintiff herein, the proposed third-

---

v. United States of America, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), which involves wrongful death claims filed by the children of two passengers aboard the aircraft; (3) *Fireman's Fund Insurance Company v. United States of America*, Civ. No. C74-24A (N.D. Ga., filed Jan. 8, 1974), which involves a property damage claim filed by the insurer of the Lear jet to recover for the total destruction of the aircraft; (4) *William Michael Fields v. United States of America, et al.*, Civ. No. C74-291A (N.D. Ga., Feb. 20, 1974), which involves a person entering his automobile and burned by the crash of the Lear jet; (5) *Chaisson v. Southeast Machinery, Inc.*, Civ. No. 74-915A (N.D. Ga., filed May 10, 1974), which involves damage to the property where the Lear jet crashed.

party defendants would be liable to the United States either through indemnification or contribution. It appears from the record that no objection has been raised by any party to the proposed third-party complaint. Pursuant to Local Court Rule 91.2 such "[f]ailure to file a response shall indicate that there is no opposition to the motion." Accordingly, with no opposition appearing, the Court grants the requested leave to file the third-party complaint subject to any defenses which may be raised by the third-party defendants.

III. MOTION TO STRIKE

Defendant DeKalb County has moved to strike various paragraphs of plaintiff's complaint for failing to state a claim either in negligence, nuisance, or for breach of contract. The Court particularly notes that defendant's motion to strike is based upon the ground that portions of plaintiff's complaint fail to state a claim upon which relief may be granted. Such a ground for a motion to strike is clearly inappropriate under Fed.R.Civ.P. 12(f).[6] The purpose of rule 12(f) is to simplify and limit the pleadings by an elimination of any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See Nuccio v. General Host Corp.*, 53 F.R.D. 234 (E.D. La. 1971). The defendant fails to enumerate these grounds in its motion. The substantive arguments made by defendant are more appropriately made in a motion to dismiss under rule 12(b)6 and will be treated as such by the Court. Accordingly, the request to strike is denied.

---

[6] See 5 Wright and Miller, Federal Practice and Procedure. § 1380, at 782 (1969) where it is stated: "[Rule 12(f)] is neither an authorized nor a proper way to procure the dismissal of all or part of a complaint. . . ."

IV. MOTION TO DISMISS

The plaintiff's complaint, as it pertains to DeKalb County, bases an alleged right of recovery on the theories of nuisance, negligence, and breach of contract. To these claims DeKalb County has filed a motion to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)6. Although various arguments are raised by the parties, the Court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity as it exists in Georgia. This issue will be discussed in the context of plaintiff's claims.

A. Nuisance

Plaintiff contends that defendants are guilty of the maintenance of a public nuisance—a garbage dump adjacent to and contiguous with the airport; that defendants knew and realized for a significant period of time that said nuisance constituted a hazard to aircraft landing and departing from the airport and; that as a result of said nuisance special damage has been sustained by plaintiff. In response to these contentions the defendant urges that Ga. Code §23-1502 bars any action against a county for maintenance of a nuisance.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." With this statutory basis the Georgia courts have required the party filing suit to show the appropriate statutory authority allowing a claim. As stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state

> is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. *See also Seymore v. Elbert County*, 116 Ga. 371 (1902); *Anderson v. DeKalb County*, 107 Ga.App. 328 (1963); *Ayers v. Franklin County*, 73 Ga.App. 207 (1945). This view was recently reaffirmed in the revised opinion of *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp., 1974), decided by the Georgia Court of Appeals. In *Sheley* the plaintiff brought suit against the Board of Education for Chatham County to recover for her child's death, allegedly caused by falling into an open septic tank located on school property. In ruling upon a motion to dismiss, the Court, in its revised opinion, refused to allow a nuisance or negligence claim against governmental subdivisions other than municipalities. This holding appears to be in accordance with the rulings of the Georgia Supreme Court. *cf. Crowder v. Department of State Parks*, 228 Ga. 436 (1971).

Plaintiff's reliance upon *Nalley v. Carroll County*, 135 Ga. 835 (1911) and *DeKalb County v. McFarland*, 223 Ga. 196 (1967), appears to be misplaced. Both cases fall within the Constitutional provision holding a county liable for damages to private property taken for public uses. *See* Ga. Code §2-301. These suits are expressly authorized and fall within the statutory exception provided for in Ga. Code §23-1502, *See Purser v. Dodge County*, 188 Ga. 250 (1939), and are not applicable to the present case.

B. **Breach of Contract**

Plaintiff, in her complaint, contends that DeKalb County executed six Federal Grant Agreements with the United States. Pursuant to the terms of these agreements DeKalb County obligated itself to perform certain duties with regard to the use and maintenance of the airport, as well as the land adjacent thereto. Plaintiff further averred that DeKalb County violated this agreement by permitting a garbage dump to be maintained in the vicinity of the airport. As a consequence of the breach of this contract, plaintiff's decedent lost his life in an attempt to take off from the airport. Based upon these allegations, plaintiff claims that decedent was a third-party beneficiary to the Grant Agreement and that she may now maintain an action against DeKalb County for breach of contract.

Although the party's briefs discuss the question of the intent of each party to create third-party beneficiary rights, the Court conceives the issue to be much narrower *i.e.* whether sovereign immunity acts as a bar to suit against the county for breach of its contract with the Federal Government. This question appears to have been answered in *Purser v. Dodge County*, 188 Ga. 251 (1939). In *Purser* a question was certified to the Georgia Supreme Court on whether a county was liable in damages to a highway traveler caused by the negligence of the county in performing its contract with the State Highway Department for paving of a highway. *Id.* at 251. The Court after discussing the effect of the doctrine of governmental immunity on suits against counties for their negligence concluded:

> [T]here is no constitutional or statutory provision which can be taken to render a county liable for a

> tort on account of personal injuries arising from a defect in a highway constructed or maintained by the county; and this is true irrespective of whether the construction or repairs of the highway was done in the performance of the county's own governmental functions in maintaining its system of highways, *or whether it was done, as stated in the certified question, under a contract made by the county with the State Highway Department solely for pecuniary gain.* (emphasis added.)

Id. at 252.

Inasmuch as this Court must follow the law of Georgia in this diversity suit, the Court finds that any claim by plaintiffs for damages resulting from the breach of the contract between DeKalb County and the United States is barred by governmental immunity. By so holding, it is unnecessary for the Court to reach the question of whether plaintiff can recover as a third-party beneficiary under the contract in question.

C. Negligence

The plaintiff's remaining claim against DeKalb County is based upon negligence in the operation and maintenance of the DeKalb-Peachtree Airport. As previously discussed with regard to the nuisance allegation, the doctrine of governmental immunity bars this claim. Nevertheless, plaintiff, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), and *Taylor v. King*, 104 Ga.App. 589 (1961) urges that a county can be held accountable for negligence when acting in a ministerial or proprietary function. Both *Caroway* and *Taylor* involved municipalities which have distinctive liabilities in Georgia not applicable to counties. In *Troup County Electric Membership Corp. v. Georgia*

Power Co., 229 Ga. 348 (1972), this distinction was explained.

> 'Counties are subdivisions of the State Government to which the state parcels its duty of governing the people (citations omitted). They are local, legal, political subdivisions of the State . . . administrating locally the general powers and policies of the State . . . .' On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. *Id.* at 352.

See also Purser v. Dodge County, 188 Ga. 250 (1939); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct.ofApp., 1974); *Ware County v. Carson*, 189 Ga. 78 (1939). The Georgia courts have consistently held that the county is an "arm of the state." As such it carries the state's burdens and responsibilities within its respective locality. On the other hand, a municipality, as a legislative creation, can select its available powers, rejecting those liabilities inapplicable to its particular purpose. It is upon this basis that the differing liabilities are based. While it must be conceded that DeKalb County has, by operating an airport, extended its activities into areas beyond its traditional functions, this Court is unable to find that the distinctive classification is unrelated to the purpose of Ga. Code §23-1502 to justify holding DeKalb County liable.

In summary, the Court (1) grants the United States' motion to consolidate this case with *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), for discovery purposes but defers ruling on consolidation for trial purposes until the pretrial hearing of this

case, (2) grants the United States' motion to file a third-party complaint, (3) denies DeKalb County's motion to strike portions of plaintiff's complaint, and (4) grants DeKalb County's motion to dismiss plaintiff's complaint as to its claims of negligence, nuisance and for breach of contract.

IT IS SO ORDERED this 27th day of June, 1974.

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

Supreme Court, U. S.
FILED
MAR 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-659

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Petitioner,

versus

DEKALB COUNTY, GEORGIA,
Respondent,

UNITED STATES OF AMERICA,
Respondent, Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,
Respondent, Third-Party Defendants.

BRIEF OF PETITIONER JUDITH ANITA PHILLIPS

A. Russell Blank
Claude R. Ross
Baxter H. Finch
Attorneys for Petitioner

Of Counsel:

ROSS & FINCH
3417 First National Bank Tower
Atlanta, Georgia 30303

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	10
STATEMENT OF THE CASE	11
SUMMARY OF ARGUMENT	15
ARGUMENT AND CITATION OF AUTHORITIES	17
CONCLUSION	45
CERTIFICATE OF SERVICE	47

TABLE OF AUTHORITIES

Cases:

Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968)	30
Bank of America v. Parnell, 352 U.S. 29 (1956)	44
Barlow v. Collins, 397 U.S. 159 (1970)	41
Baxstrom v. Herold, 383 U.S. 107 (1966)	30
Bell v. Hood, 327 U.S. 678 (1946)	24
Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1957)	43
Braniff Airways v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954)	19
Briggs v. Sagers, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970)	20

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Campbell v. State of Indiana, 284 N.E. 2d 733 (Ind. 1972) 29

Caroway v. City of Atlanta, 85 Ga.App. 792 (1952) .. 32

Case Company v. Borak, 377 U.S. 426 (1964) 23, 24

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968) 20

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 21

City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971) 41

Colorado Racing Commission v. Brush Racing Association, 316 P.2d 582 (Colo. 1957) 29

Cort v. Ash, 422 U.S. 66 (1975) 16, 23

Deason v. DeKalb County, 222 Ga. 63 (1966) 36

Decatur County v. Praytor & C. Contr. Co., 163 Ga. 929, 933 (137 SE 247) 38

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 24

Deitrick v. Greaney, 309 U.S. 190 (1940) 24

Eisenstadt v. Baird, 405 U.S. 438 (1972) 30

Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) 40

Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2nd Cir. 1956) 25

Flores v. Pan American World Airways, 259 F.Supp. 402 (D. P.R. 1966) 25

Gabel v. Hughes Air Corp., 350 F.Supp. 612 (C.D. Calif. 1972) 22

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Granite Oil Securities, Inc. v. Douglas County, 219 P.2d 191 (Nev. 1950) 32

Griffin v. State of Illinois, 351 U.S. 12 (1956) 30

Hancock County v. Williams, 230 Ga. 723 (1973) ... 37

Hargrove v. Town of Cocoa Beach, 96 S.2d 130 (Fla. 1957) 29

Hicks v. New Mexico, 544 P.2d 1153 (N. Mex. 1976) 28, 29

Holland v. Phillips, 94 Ga. App. 361 (1956) 40

Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962) 29

In Re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Calif. 1975) 22

Levy v. Louisiana, 391 U.S. 68 (1968) 30

Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967) 30

Lucas v. Forty-Fourth General Assembly of State of Ohio, 377 U.S. 713 (1964) 29

Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975) 41

McAndrew v. Mularchuk, 162 Atl. 2d 820 (N.J. 1960) 29

McGowan v. Maryland, 366 U.S. 420 (1961) 30

McLaughlin v. State of Florida, 379 U.S. 184 (1964) 30

M. R. Thomason & Associates, Inc. v. Wilson, 125 Ga.App. 658 (1972) 40

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) 24

Molitor v. Kaneland Community District, 163 N.E.2d 89 (Ill. 1959) 29

Morey v. Doud, 354 U.S. 457 (1958) 30

Mortimer v. Delta Air Lines, 302 F.Supp. 276 (N.D. Ill. 1969) 25

Muskopf v. Corning Hospital District, 359 P.2d 457 (Calif. 1961) 29

Northwest Airlines v. Minnesota, 322 U.S. 292 (1944) 20

Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964) 19

Parish v. Pitts, 429 S.W.2d 45 (Ark. 1968) 29

Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3rd Cir. 1971) 20

Pierce v. Yakima Valley Memorial Hospital Association, 260 P.2d 765 (Wash. 1953) 29

Porter v. Warner Holding Company, 328 U.S. 395 (1946) 24

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D. Pa. 1967) 43

Rausch v. United Instruments, Inc., 405 F.Supp. 435, (E.D. Pa.), *on rehearing*, 405 F.Supp. 442 (1975) 16, 25

Reed v. Reed, 404 U.S. 71 (1971) 30

Reynolds v. Sims, 377 U.S. 533 (1964) 29

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Rhodes v. City of Asheville, 230 N.C. 135 (N. C. 1942) 32

Rinaldi v. Yeager, 384 U.S. 305 (1966) 30

Rohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 21

Roman v. Sincock, 377 U.S. 695 (1964) 29

Royster Guano v. Virginia, 253 U.S. 412 (1920) 30

S.S.W., Inc. v. Air Transport Association of America, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952) 25

Schine Chain Theatres, Inc. v. United States, 344 U.S. 110 (1948) 24

Seaboard Air Line Railroad v. County of Crisp of State of Georgia, 280 F.2d 873 (5th Cir. 1960), *cert. denied*, 375 U.S. 942 (1961) 44

Sheppard v. Bridges, 137 Ga. 615 (1911) 37

Smith v. Ledbetter Brothers, Inc., 111 Ga.App. 238 (1965) 39

Sola Electric Company v. Jefferson Electric Company, 317 U.S. 173 (1942) 24

Southern Airways Company v. DeKalb County, 102 Ga.App. 850, *cert. denied*, 118 S.E.2d 234 (1960) 18, 40

Spanel v. Mounds View School District Number 621, 118 N.W.2d 795 (Minn. 1962) 29

State Construction Company v. Johnson, 88 Ga. App. 651 (1953) 40

TABLE OF AUTHORITIES (Continued)

Page

Cases—Continued:

Tinsley v. Anderson, 171 U.S. 101 (1898) 31

Town of East Haven v. Eastern Air Lines, Inc., 282 F.Supp. 507 (D.Conn. 1968) 25

Town of New Windsor v. Ronan, 321 F.Supp. 1286 (S.D. N.Y.), *affirmed*, 481 F.2d 450 (2nd Cir. 1973) 41

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944) 24

United States v. Orleans, 425 U.S. 807 (1976) 22

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 44

Washington County v. Sheppard, 46 Ga. App. 240 (1933) 36

Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 (1972) 30

Williams v. City of Detroit, 111 N.W.2d 1 (Mich. 1961) 29

Williams v. Georgia Power Company, 233 Ga. 517 (1975) 38

Wills v. Trans World Airlines, 200 F.Supp. 360 (S.D. Calif. 1961) 25

Statutes:

28 U.S.C. §1337 19

49 U.S.C. §1110 ..... 12, 23

49 U.S.C. §1508(a) 2, 18

49 U.S.C. §1711 ..... 10, 12, 15, 17, 23, 42

49 U.S.C. §1716 ..... 3, 42

49 U.S.C. §1718 ..... 6, 42

Georgia Code Annotated §11-201 ..... 8, 27, 32, 37

Georgia Code Annotated §23-1502 ..... 28, 37, 38, 39

Georgia Code Annotated §3-108 ..... 10, 37

Georgia Code Annotated §11-405 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-659

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,

Petitioner,

versus

DEKALB COUNTY, GEORGIA,

Respondent,

UNITED STATES OF AMERICA,

Respondent, Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,

Respondent, Third-Party Defendants.

BRIEF OF PETITIONER JUDITH ANITA PHILLIPS

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit, entered after rehearing, is reported at 538 F.2d 643, and was reprinted in its entirety in Appendix A to the Petition for a Writ of Certiorari filed by Petitioner herein. The original panel

decision of the United States Court of Appeals for the Fifth Circuit is reported at 526 F.2d 679, and was reprinted in its entirety as Appendix B to the Petition for a Writ of Certiorari by Petitioner herein. The opinion of the United States District Court for the Northern District of Georgia, dated September 25, 1974, which is not reported, was reproduced in its entirety as Appendix C of the Petition for a Writ of Certiorari of Petitioner herein. The original opinion of the United States District Court for the Northern District of Georgia, dated June 27, 1974, which is not reported, is reprinted in its entirety as Appendix D to the Petition for a Writ of Certiorari by Petitioner herein.

JURISDICTION

The original judgment of the United States Court of Appeals was entered on January 30, 1976. Respondent filed a petition for rehearing in said Court, resulting in the original judgment of said appellate tribunal being modified by judgment entered on August 25, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following Acts and statutes are relevant to the questions presented by this Petition:

49 U.S.C. §1508(a)

"Declaration of national sovereignty in airspace; operations of foreign aircraft

(a) The United States of America is declared to possess and exercise complete and exclusive national

sovereignty in the airspace of the United States, including the airspace above all inland water and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. . . ."

(Pub.L. 85-726, Title XI, §1108, Aug. 23, 1958, 72 Stat. 798.)

---

49 U.S.C. §1716

"Project applications for airport development

Submission

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the

municipality or other public agency is prohibited by the law of that State.

Approval

(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provision for

the installation of the landing aids specified in subsection (d) of section 1717 of this title and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect. . . ."

(Pub.L. 91-258, Title I, §16, May 21, 1970, 84 Stat. 226; 1970 Reort. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Pub.L. 93-44, §4, June 18, 1973, 87 Stat. 89.)

49 U.S.C. §1718.

"Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors

As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

Public use

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

Maintenance and operation

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

Airport hazards

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or cration of future airport hazards;

Compatible use of adjacent land

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Government use; charge

(5) all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used;

Air traffic control activities

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

Accounting

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

Self-sustaining fee and rental structure

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection;

Reports

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

Inspection of records

(10) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under this subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this section."

(Pub.L. 91-258, Title I, §18, May 21, 1970, 84 Stat. 229.)

Georgia Code Annotated, §11-201

"Municipalities, etc., may acquire airports

Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to

acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties, or political subdivisions. All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other State, as well as all municipalities and other political subdivisions which are located in such boundary counties, are hereby authorized, separately, jointly with each other or jointly with any county, municipality or political subdivision of any such border State, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing-fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality or political subdivision of any such border State other than the State of Georgia."

(Acts 1933, p. 102; 1941, p. 380.)

Georgia Code Annotated, §11-405

"Airport Zoning; things to be considered in adopting or revising

In adopting or revising any such zoning regulations, the political subdivision shall consider, among other

things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the Federal Government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport."

(Acts 1946, pp. 121, 123.)

Georgia Code Annotated, §3-108

"Parties to actions on contracts

As a general rule, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

(Acts 1949, p. 455.)

QUESTIONS PRESENTED

1. Does the Federal Airport and Airway Development Act, 49 U.S.C. §1711, et seq., provide a remedy to survivors of deceased passengers aboard an aircraft which crashed because of a county's violation of the provisions thereof?

(a) Is the field of air commerce so thoroughly regulated by the Federal Government as to preempt States from placing limitations on liability for violation of federal aviation statutes?

(b) Does said statute permit an implied Federal civil remedy against parties found to be in violation thereof?

2. Is the continued recognition of the doctrine of sovereign immunity as a defense to county liability upon the facts of the present litigation an arbitrary and irrational distinction in violation of the Equal Protection Clause of the United States Constitution?

3. Does Petitioner have standing to sue DeKalb County, Georgia, as a beneficiary of the numerous Grant Agreements between the United States of America and DeKalb County, Georgia?

STATEMENT OF THE CASE

This action is before the Court to review the dismissal of Petitioner's complaint for failure to state a claim upon which relief can be granted. Consequently, a review of the facts as are contained in said complaint, as well as those facts known to exist, would be appropriate in the evaluation of the propriety of the subject dismissal.

As stated in said complaint (A.107), on February 26, 1973, at approximately 10:12 a.m., a learjet Model 24 aircraft took off from Runway 20L at DeKalb-Peachtree Airport in Atlanta, Georgia. Immediately after becoming airborne, the turbine or jet engines of said aircraft ingested a large number of birds, which resulted in the loss of the necessary engine thrust and the eventual crash of said aircraft, killing all passengers aboard, including Petitioner's husband, David Emanuel Phillips.

DeKalb-Peachtree Airport is located in DeKalb

County, Georgia, on land transferred to said County by the General Services Administration of the United States of America on or about February, 1960. On said airport property and land deeded to DeKalb County, Georgia, by the United States of America, there was commenced in 1962 a garbage dump. Said garbage dump was closed from 1964 through 1966, when it was reopened, and has been continuously utilized as such through and including the time of the crash here involved.

For several years prior to February 26, 1973, DeKalb County, Georgia, and the United States of America discussed, corresponded, met, and argued over the closing of said garbage dump and the attraction of said garbage dump to thousands of migratory birds.

Nevertheless, since 1960, DeKalb County was the recipient of six separate Federal Grant Agreements with the United States pursuant to the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq., and such Act's predecessor, the Federal Airport Act, 49 U.S.C. §1110, et seq. In fact, the particular runway used by the Learjet aircraft here involved was constructed with monies received by DeKalb County pursuant to said Grant Agreements.

By said Grant Agreements, DeKalb County obligated itself to perform certain duties with regard to the use thereof, as well as land lying in the immediate vicinity of said airport. As taken from said contracts with the United States, there appears, *inter alia*, the following:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal

aid for the Project or any portion thereof made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.

2. *The Sponsor will operate the Airport as such for the use and benefit of the public.* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the Airport or necessary *to serve the civil aviation needs of the public.* . . .

6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for Airport purposes:* . . .

11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants herein made. . . .

12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so

approved by the FAA, if such changes or alterations might affect the *safety*, utility, or efficiency of the Airport.

13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.*" (A.26)

Each of the above assurances, covenants, promises, and contractual obligations has been violated by the activities of DeKalb County, as well as others not herein specified.

Subsequent to the crash of the Learjet aircraft and the death of Petitioner's decedent, the United States of America instituted an action in the United States District Court for the Northern District of Georgia, whereby it sought and obtained injunctive relief as to the operation of jet aircraft into and out of the DeKalb-Peachtree Airport. Judith Anita Phillips, widow of David Emanuel Phillips, deceased, instituted the present action for the wrongful death of her decedent, against DeKalb County, Georgia, and the United States of America, pursuant to diversity jurisdiction, 28 U.S.C. §1332, and the Federal Tort Claims Act, 28 U.S.C. §1346(b), respectively. The complaint as filed sought recovery against said Defendants upon the basis of negligence, nuisance, and as a third-party beneficiary to the contractual agreements between said Defendants. Respondent DeKalb County, Georgia, moved the District Court to dismiss Petitioner's Complaint as failing to state a claim upon which relief can be granted (A.125), which motion was granted by the District Court on June 27, 1974. See Appendix D

to the Petition for a Writ of Certiorari of Petitioner herein. The motion for reconsideration and to set aside said order and judgment was denied by the District Court by order dated September 24, 1974. See Appendix C to the Petition for a Writ of Certiorari of Petitioner herein. Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which Court on January 30, 1976, affirmed the District Court as to its dismissal of Petitioner's Complaint upon the bases of negligence and nuisance, but reversed the District Court and held Petitioner to be a third-party beneficiary of the subject Grant Agreements. See Appendix B to the Petition for a Writ of Certiorari of Petitioner herein. Respondent, DeKalb County, Georgia, moved the Court for rehearing and rehearing en banc, and said petition was granted, resulting in the Court of Appeals' affirming the District Court holding in all respects by order and judgment entered August 25, 1976. See Appendix A to the Petition for a Writ of Certiorari of Petitioner herein.

SUMMARY OF ARGUMENT

Petitioner contends that the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq., was a lawful and legitimate exercise of Congress' commerce power, which Act is but a part of the overall extensive, pervasive, and exclusive exercise of such authority with regard to interstate air commerce. The Commerce Clause permits, and the Federal statutes and regulations authorize, States and counties to participate in the receipt of federal monies and funds, but upon voluntarily accepting the benefits of said federal program, a county cannot circumscribe its liability and bar responsibility upon the basis of

sovereign immunity. Consequently, the Federal Government has preempted any limitations on liability when an otherwise immune governmental agency avails itself of the benefits of acting in a proprietary capacity.

In addition, the holding of this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny *Rausch v. United Instruments, Inc.*, 405 F.Supp. 435 (E.D. Pa.), *on rehearing*, 405 F.Supp. 442 (1975), clearly hold that an implied federal civil remedy exists with regard to the particular Act in question. Said remedy is available to effectuate the purposes of said Act, which primarily is to promote air safety. Accordingly, Petitioner possesses not only a right but a remedy which cannot be defeated by the assertion of sovereign immunity as a defense.

Further, the majority of the States of the United States have concluded that no rational justification exists for the continued recognition of governmental immunity, at least as to those proprietary activities in which local governments now engage. This Court now has ruled that statutes which are arbitrary in nature; which create a classification without reason and rationality; and are incapable of achieving a desired objective, constitute a violation of the Equal Protection Clause of the United States Constitution. Applying both principles to the case at bar, then Respondent should not be able to avail itself of said defense as a bar to liability.

Lastly, Petitioner contends that irrespective of whether state law or federal common law is utilized to determine Petitioner's rights as a third-party beneficiary to Grant Agreements made between the United States and DeKalb County, Georgia, she has stated a

claim upon which relief can be granted. Under the law of the State of Georgia, a private individual has a right to sue a county upon a contract which it is authorized to make for wrongful death damages sustained and incurred. Similarly, under several federal court decisions, the particular Aviation Statute and Grant Agreements here involved were construed and found to impose liability upon a breaching party, which liability ran to injured and deceased third-party beneficiaries of said Agreements.

For all of the above reasons, Petitioner contends that she has stated a claim upon which relief can be granted, and that the trial and appellate Courts erred in their ultimate conclusions with regard to the same.

ARGUMENT AND CITATION OF AUTHORITIES

PART I

1. DOES THE FEDERAL AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970, 49 U.S.C. §1711, ET. SEQ., PROVIDE A REMEDY TO SURVIVORS OF DECEASED PASSENGERS ABOARD AN AIRCRAFT WHICH CRASHED BECAUSE OF A COUNTY'S VIOLATION OF THE PROVISIONS THEREOF?

(a) IS THE FIELD OF AIR COMMERCE SO THOROUGHLY REGULATED BY THE FEDERAL GOVERNMENT AS TO PREEMPT STATES FROM PLACING LIMITATIONS ON LIABILITY FOR VIOLATION OF FEDERAL AVIATION STATUTES?

While this Court has on numerous occasions considered the pervasive effect of the regulatory network pertaining to aviation and aeronautical commerce,

the present litigation presents the unanswered question of whether a county participating as a private individual in air commerce can circumscribe its liability for tortious misconduct. Petitioner avers that DeKalb County, Georgia, has voluntarily elected to participate in such business activity when it assumed the responsibility for the operation and financial success of DeKalb-Peachtree Airport, and by so doing, waived any claim of sovereign immunity resulting from its negligent activities with regard to the same.

At the outset, it is understood and acknowledged by all parties hereto, including Respondent DeKalb County, Georgia, that DeKalb-Peachtree Airport is, in fact, being operated in a proprietary or business capacity. Such interest in said airport was further recognized by the Courts of the State of Georgia, where, in *Southern Airways Company v. DeKalb County*, 102 Ga. App. 850, *cert. denied*, 118 S.E. 2d 234 (1960), the Georgia Appellate Court specifically held that Respondent was engaged in a business or proprietary function when it operated the particular airport here in question. Consequently, no issue exists as to whether Respondent was acting as a private individual or corporation, with a profit motive, as to the particular airport here involved.

As to the issue presently under consideration, the Court will note that Congress has specifically announced its legislative intent when in 49 U.S.C. §1508(a), it stated,

> "The United States of America is declared to possess and exercise complete *and exclusive national sovereignty* in the airspace of the United States, including the airspace above all inland waters and

> the airspace above those portions of the adjacent marginal high seas, bays, and lakes over which by international law or treaty or convention the United States exercises national jurisdiction." (Emphasis added.)

Said expression of intent was recognized by this Court in *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), when it was held that federal acts and regulations governing air commerce are certainly bottomed upon the commerce power of the United States Congress, and as such, may extend to their logical limit. Pursuant to said authorization, the Federal legislature has authorized the United States District Courts to enter and adjudicate all controversies with regard to commerce without regard to jurisdictional amount or diversity of citizenship. *See*, 28 U.S.C. §1337.

The position herein under consideration is whether the congressional recognition of its right and supremacy as to interstate commerce, and in particular with regard to aviation, permits a State, and its political subdivision, to limit its responsibility for violations of federal aviation statutes and thus place a burden upon interstate commerce. In answer to this inquiry, this Court held, in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), that a State forfeited a portion of its sovereignty and waived its immunity for all acts done within the realm of congressional legislation and regulation. As such, said State acted as a private person or corporation, and was thus subject to regulation and suit. *Id.* at 196.

Since this Court's holding in *Parden*, numerous Courts of Appeal have reached similar conclusions as

to varying governmental enactments within the purview of the commerce clause. In *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971), the Court found that a state highway department was not immune from suit, and had waived a portion of its sovereign immunity. Similarly, in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968), the Court concluded that the State of Virginia had relinquished its immunity in a suit by a ship owner, while the Court in *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970), found that the State of Utah waived immunity from liability under the Fair Labor Standards Act because of the regulatory power of Congress under the Commerce Clause to the United States Constitution.

While the foregoing authorities recognize the limits of Congressional authority over interstate commerce, in areas where State regulation is frequently concurrent with the exercise of Federal regulation, the field of aviation is almost exclusively dominated and controlled by the Federal Government. This Court, through Justice Jackson, recognized that fact in *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944), when it held as follows:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel, and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the

> control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone, and not to any state government." *Id.* at 303.

A more recent and similar holding to that just quoted can be found in this Court's decision of *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Consequently, DeKalb County, Georgia, has not merely entered into the area of regulating work conditions of employees within this State or establishing criteria for the construction of highways within this State, where federal and state regulations are nearly coextensive, but has entered into the realm of federal aviation, and interstate commerce connected therewith, wherein federal regulation is overriding, compelling, and exclusive. No clearer example could exist of federal preemption. As such, all State concepts of limited liability must yield, and DeKalb County must be placed in equal footing with other private individuals who fall within the purview and scope of the aviation statutes of this country.

In recognition of this concept, the Court in *Rohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), refused to apply the Indiana rule and applied the federal principle of contribution and indemnity as to a mid-air crash over said State. The Court in *Rohr* recognized federal preemption over aviation and further found that result to be mandated by virtue of the fact that the United States was a party to said suit pursuant to the Federal Tort Claims Act. Likewise, in the present litigation, the United States is a party pursuant to said statute. The Courts in

In Re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Calif. 1975); and *Gabel v. Hughes Air Corp.*, 350 F.Supp. 612 (C.D. Calif. 1972), concluded that the Federal Government has preempted the field of aviation and thoroughly controlled all aspects with regard to the same. Consequently, a violation of a duty owed to the Administrator of the Federal Aviation Administration under any of the Acts imposing responsibilities on private individuals created a right of action in the one who is injured or damaged by reason of such violation.

What then remains is to question the answer of the Court below to this particular inquiry. The Court will note that in the per curiam decision of the en banc Court, reference was made to this Court's holding in *United States v. Orleans*, 425 U.S. 807 (1976), as being dispositive of Petitioner's right of recovery. However, the lower Court's reliance on said holding is misplaced. In said decision, this Court had occasion to consider the responsibility of the Federal Government pursuant to the Federal Tort Claims Act for acts of a community action agency, because said agency received Federal grants, contracts, etc. Consequently, the United States was directly sued upon an agency or respondeat superior theory of liability. This Court found that inasmuch as the United States did not engage or control the day-to-day operations of said agency, it could not be held responsible for any actions by such entity. Clearly, the facts and holding of this Court in *Orleans* are in no way applicable to the present litigation.

Instead, this Court must determine whether DeKalb County, Georgia, entering into the operation of an airport for the purpose of making a profit, may operate

said airport in violation of the Federal Aviation Statutes of this country and escape liability to persons injured or damaged as a result thereof. In light of the aforesaid holdings, the inescapable conclusion is that a State and its political subdivision waive sovereign immunity to the extent that they act as a private individual in the area of aeronautical interstate commerce. Under the facts of the present litigation, DeKalb County, Georgia, should thus be held responsible for its clear violation of the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq., and such Act's predecessor, the Federal Airport Act, 49 U.S.C. §1110, et seq.

(b) DOES SAID STATUTE PERMIT AN IMPLIED FEDERAL CIVIL REMEDY AGAINST PARTIES FOUND TO BE IN VIOLATION THEREOF?

Closely associated with the right of Petitioner to sue DeKalb County, Georgia, because of the applicability of federal preemption in the field of aeronautical commerce, is the right of Petitioner to proceed under the Federal Airport and Airway Development Act of 1970 pursuant to an implied federal civil remedy.

In this regard, all cases which recently have had occasion to consider the propriety of fashioning a federal remedy from a particular legislative enactment refer to this Court's holding in *Cort v. Ash*, 422 U.S. 66 (1975). While particular reference will be made hereafter to the particular tests to be employed as announced by this Court in *Cort*, the right of Federal Courts to fashion private civil remedies has long been recognized.

In the holding of *Case Company v. Borak*, 377 U.S. 426

(1964), this Court found a private right of action under the Securities and Exchange Act, since the purpose of said Act was for the protection of investors. Consequently, an investor who was damaged as a result of a violation of said Act could base a right of recovery thereon. For other cases wherein this Court has recognized the power of Federal Courts to respond to announced federal policies and fashion a remedy consistent with a particular statutory enactment, the Court is referred to *Mitchell v. Robert DeMario Jewelery, Inc.*, 361 U.S. 288 (1960); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *Porter v. Warner Holding Company*, 328 U.S. 395 (1946); *Bell v. Hood*, 327 U.S. 678 (1946); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); and *Deitrick v. Greaney*, 309 U.S. 190 (1940). Consequently, it is well established that the Federal Courts have the inherent power to fashion and create a civil remedy which would implement the legislative scheme of a particular statutory enactment.

Recognizing the disparity in tests being employed by the various Federal appellate tribunals, this Court in *Cort v. Ash*, *supra*, reviewed, coalesced, and again recognized the principal of implied federal remedies where such are necessary to effectuate the purpose of the legislation in question. In *Cort*, this Court further enumerated four tests to be employed in the determination of whether a federal civil remedy should be implied where none is specifically stated in the particular enactment. Said tests are as follows: (1) Is the plaintiff in a class for whose especial benefit the statute

was created? (2) Is there an explicit or implicit legislative intent to create or deny such a remedy? (3) Is the implication of a civil remedy to the plaintiff consistent with the underlying purpose of said legislation? (4) Is the cause of action one traditionally relegated to State law in an area basically of concern to the States, so as to make it inappropriate to infer a remedy on Federal law?

A careful review of the Aviation Acts and their legislative history amply substantiates the conclusion that a Federal civil remedy would be compatible with the criteria enunciated in *Cort*. In fact, such a conclusion has already been reached by a number of Federal Courts prior to this Court's holding in *Cort v. Ash*. For other aviation cases where federal remedies were recognized and acknowledged, *See, e.g., Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2nd Cir. 1956); *S. S. W., Inc. v. Air Transport Association of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952); *Mortimer v. Delta Air Lines*, 302 F.Supp. 276 (N.D. Ill. 1969); *Town of East Haven v. Eastern Air Lines, Inc.*, 282 F.Supp. 507 (D. Conn. 1968); *Flores v. Pan American World Airways*, 259 F.Supp. 402 (D. Puerto Rico 1966); and *Wills v. Trans World Airlines*, 200 F.Supp. 360 (S.D. Calif. 1961).

While the aforesaid citations relate to aviation cases where Federal Courts have implied a civil remedy, none of said opinions applied the criteria of *Cort v. Ash, supra*. However, the Court in *Rausch v. United Instruments, Inc.*, 405 F.Supp. 435 (E.D. Pa.), *on rehearing*, 405 F.Supp. 442 (1975), construed and applied each of the four tests announced in *Cort* and concluded that a federal civil remedy was appropriate. With regard to

the first test above, the Court in *Rausch* held that there was clearly an overriding legislative purpose to promote safety in aviation for those who own and/or fly in aircraft. Further, since death and/or injury is the result sought to be prevented, then suits for such damage are clearly proper. With regard to the second test, no legislative intent exists or can be found to deny private civil remedies under said Act. In fact, numerous cases, as cited previously, recognize the legislative intent to provide such remedies under the various aviation statutes of this country. Third, a private right of action will encourage compliance with the Act, and is, therefore, consistent with the underlying purpose to promote air safety. In other words, inasmuch as civil liability will obviously induce compliance, an immunity from liability will have the converse effect, and, thus, the obvious intent of Congress will be best effectuated by the recognition of a federal civil remedy. Lastly, aviation and air commerce are not and have never been areas basically of concern to the States, and have traditionally been regulated almost exclusively by the Federal Government. Consequently, the Court in *Rausch* recognized a private civil remedy under the particular Act here involved.

Accordingly, DeKalb County, Georgia, can not rely upon the doctrine of governmental immunity when it enters the Federal Sphere governing and controlling interstate commerce through aviation. In addition, there should be recognized an implied federal civil remedy available to those for whose benefit the Aviation Acts of this country were created, namely, the aeronautical users and participants in interstate air commerce. Petitioner herein is a person intended to be benefited by

the Federal Aviation Statutes, and to deprive her of a remedy would impose an insuperable burden upon interstate commerce, and a substantial departure from the clear holding of this Court and other federal tribunals that have had occasion to consider the same.

PART II

2. IS THE CONTINUED RECOGNITION OF THE DOCTRINE OF SOVEREIGN IMMUNITY AS A DEFENSE TO COUNTY LIABILITY UPON THE FACTS OF THE PRESENT LITIGATION AN ARBITRARY AND IRRATIONAL DISTINCTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

Respondent DeKalb County, Georgia, operates the subject airport pursuant to a statutory scheme known as the Uniform Airport Act, and codified in Georgia law as Georgia Code Annotated §11-201, et seq. In said statutory framework, both counties and cities are eligible on an equal basis for federal aid under the various Federal Aviation Acts providing such monetary assistance. Nevertheless, despite the statute's intent to be applied uniformly throughout the United States, and the desirability of having interstate air commerce be subject to substantially similar statutory provisions throughout this country, the State of Georgia has continued to recognize the common law concept of sovereign immunity. In this portion of Petitioner's brief, attention is to be directed to the continued viability of said doctrine, at least insofar as it purports to apply to interstate air commerce, as well as the propriety of the District Court's ruling that the Uniform Airports Act of the State of Georgia was not an

implied waiver of sovereign immunity compatible with the provisions of Georgia Code Annotated §23-1502, barring county liability unless made so by statute.

It has long been recognized that the concept of sovereign immunity is of judicial origin rather than a legislative enactment. While some States have codified the concept, many Courts are acknowledging that what the judiciary has given, they may likewise take away. In this regard, the Courts of numerous States have recognized that the judiciary and not the legislature is the proper forum to strike the outmoded concept of sovereign immunity. It should be noted that the States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Nebraska, Nevada, New Jersey, New York, Oregon, Rhode Island, Utah, Vermont, Washington, Wisconsin, District of Columbia, Kansas, Pennsylvania, and West Virginia have abolished sovereign immunity in their States. Of the twenty-four States just listed, eleven had sovereign immunity overturned by judicial decree rather than by and through the legislature. In addition, the States of Connecticut, Kentucky, Michigan, Minnesota, Tennessee, North Carolina, South Carolina, Texas, and Arkansas, have partially abolished the concept of sovereign immunity as to certain aspects and areas to which it previously was applicable. Other States, such as Georgia, have abolished sovereign immunity in certain areas where insurance was authorized, acquired and applicable to the particular cause of action.

For a review of the philosophies and policy reasons given for the abolition of sovereign immunity, wholly or in part, the Court is referred to the holdings in *Hicks v.*

New Mexico, 544 P.2d 1153 (N. Mex. 1976); *Parish v. Pitts*, 429 S.W. 2d 45 (Ark. 1968); *Spanel v. Mounds View School District Number 621*, 118 N.W. 2d 795 (Minn. 1962); *Colorado Racing Commission v. Brush Racing Association*, 316 P.2d 582 (Colo. 1957); *Hargrove v. Town of Cocoa Beach*, 96 S.2d 130 (Fla. 1957); *Muskopf v. Corning Hospital District*, 359 P.2d 457 (Calif. 1961); *Pierce v. Yakima Valley Memorial Hospital Association*, 260 P.2d 765 (Wash. 1953); *McAndrew v. Mularchuk*, 162 Atl. 2d 820 (N.J. 1960); *Molitor v. Kaneland Community District*, 163 N.E. 2d 89 (Ill. 1959); *Williams v. City of Detroit*, 111 N.W. 2d 1 (Mich. 1961); *Holytz v. City of Milwaukee*, 115 N.W. 2d 618 (Wis. 1962); and *Campbell v. State of Indiana*, 284 N.E. 2d 733 (Ind. 1972). All of said holdings hold and state that the defense of sovereign immunity can no longer be justified upon the basis that the "King can do no wrong." A review of the English Common Law establishes that the concept of sovereign immunity had an origin which was accidental, that its sole advantage is expediency, and that a continuation of said concept has progressed through inertia. There, thus, exists no rational basis for its continuance, and a majority of the States of this country have so recognized.

It has long been recognized that citizens retain the right not to be subject to discrimination because of their location. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. Forty-Fourth General Assembly of State of Ohio*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964). Likewise, the Fourteenth Amendment to the United States Constitution, and in particular the Equal Protection Clause thereof, requires that any statutory classification of a State be neither arbitrary nor sub-

ject to invidious discrimination. *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).

As applied to a particular factual situation, this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968); and *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972), found an irrational and invidious discrimination resulting from the classification of illegitimate children, and struck down as unconstitutional any application of Louisiana law which denied illegitimate children the rights and benefits to which they were entitled. As held by this Court, there, thus, must exist as to any legislative classification by a State a reasonable and rational difference between categories of citizens, and such classification must have a fair and substantial relation to the object to be achieved by such legislation. *Royster Guano v. Virginia*, 253 U.S. 412 (1920); *Morey v. Doud*, 354 U.S. 457 (1958); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Reed v. Reed*, 404 U.S. 71 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Therefore, while every classification by a State is not a violation of equal protection, those that are arbitrary will be so held, as will those founded upon an irrational basis. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Griffin v. State of Illinois*, 351 U.S. 12 (1956); *McLaughlin v. State of Florida*, 379 U.S. 184 (1964); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

What then remains is to apply the aforesaid principles to the facts of the present litigation. In summary, as has been recognized by a majority of the States of this country, there exists no rational basis for the continuing recognition of sovereign immunity. Under the cited decisions of this Court, statutory classifications which are arbitrary in nature and founded upon an irrational

basis, constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Even more violative should be those classifications merely founded upon judicial edict and without statutory recognition, such as the concept of sovereign immunity. Inasmuch as DeKalb County, Georgia, relies upon the irrational defense of sovereign immunity as its sole bar to liability, this Court should hold said defense to be violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The constitutional infirmity in the classification scheme is further exemplified by the fact that under the law of the State of Georgia, had the occurrence here involved taken place at Atlanta's major air carrier airport, namely Atlanta Hartsfield Airport, then Petitioner would have had full right of recovery as against the City of Atlanta, whereas she is now denied of any form of recovery from DeKalb County, Georgia. Such distinction in treatment has long been condemned by this Court, as is shown by the holding in *Tinsley v. Anderson*, 171 U.S. 101 (1898). In *Tinsley*, this Court recognized that no equal protection violation would exist where the same course of procedure applied to the person in question would have been applied to any other person under the same circumstances. The present situation is exactly the converse of that position, i.e., Petitioner has substantially different rights merely because her deceased husband crashed after departing from an airport but ten miles away from that owned by the City of Atlanta. Such a result is not only unjust and inequitable, but patently violative of the constitutional protections to which she is entitled.

Petitioner also contends that the Courts below have

improperly construed the applicability and operation of the Uniform Airports Act of the State of Georgia, Georgia Code Annotated §11-201, et seq. Said statutory scheme was intended to promote a uniform and consistent interpretation of various State-enacted aviation statutes. As was stated by the Court in *Caroway v. City of Atlanta*, 85 Ga. App. 792 (1952),

> "And where substantially such laws have been so adopted, it is our thought that the Courts of the various States should seek a harmonious interpretation of the provisions." *Id.* at 796.

The Court further held that such statutes were intended to provide a framework wherein local governmental agencies could engage in the construction, operation, and maintenance of airport facilities. The Court in *Caroway* then proceeded to cite and quote with approval from the decisions of the Courts in Nevada and North Carolina. *Granite Oil Securities, Inc. v. Douglas County*, 219 P.2d 191 (Nev. 1950); *Rhodes v. City of Asheville*, 230 N.C. 135 (N.C. 1942). By reference to the *Granite Oil* case, the Nevada Supreme Court held as follows:

> "It is well settled law, frankly conceded by the respondent county, that when a municipal corporation acts in its private, corporate, or proprietary capacity, it may be sued for torts. . . . Respondents stand squa ely on the contention 'that a country, being a political subdivision of the State, cannot be sued in tort, regardless of the nature of the function, without legislative authorization.' . . . Perhaps even more convincing than some of the reasoning of the North Carolina court are the provisions of the 1947 act authorizing agreements between two or more cities and counties defining the proportionate interest of each in the property,

> facilities, and privileges, the duties and liabilities of each in the operation. . . . It is difficult to conceive of language which more aptly and more effectively places the county in precisely the same position as the municipality in the operation of such joint enterprise of maintaining and operating an airport. The entire structure of such a joint enterprise would fail if as a matter of law the municipality would be liable for its torts while the county would not." *Id.*

The Georgia Uniform Airports Law is substantially identical to that considered by the Court in *Granite Oil*, as is Georgia's acknowledgment of county immunity whereas such immunity would not exist and be applicable to municipalities.

Both the Georgia Court of Appeals in *Caroway v. City of Atlanta*, *supra*, and the Nevada Supreme Court in *Granite Oil Securities, Inc. v. Douglas County*, *supra*, have cited with approval and relied upon the North Carolina holding in *Rhodes v. City of Asheville*, *supra*, wherein the plaintiff brought an action against said city, the county, and others, for wrongful death of his intestate who was killed through the negligence of an employee at the airport. After discussing the same issues as are raised by respondent in the case at bar, the North Carolina Court concluded that,

> ". . . when it [the county] undertakes, with legislative sanction, to perform an activity which is proprietary or corporate in character, such a county may be liable in tort to the same extent as a city or town would be if engaged in the same activity." *Id.*

The aforesaid decisions have been cited with approval by several Georgia Courts, and, thus, are in conformity with the laws of this State. Accordingly,

the legislature has granted to the counties of this State authority to cooperate and join with municipalities in the construction, operation, and maintenance of airports, and has by implication granted to private individuals a right of action against either governmental entity under said uniform statutory network.

Consequently, the Courts below have failed to recognize the implied waiver of sovereign immunity which is a necessary adjunct to the adoption of the Uniform Airports Law. Only by utilizing such a construction so as to permit liability on an equal basis would said statutes have a rational basis so as to avoid the aforementioned charge of unconstitutionality. Therefore, the holding presently under review not only constitutes an erroneous interpretation of Georgia law, but also seeks to impart an unconstitutional application of such statutes under the Fourteenth Amendment to the United States Constitution. As such, this Court should reverse and remand with directions to acknowledge the responsibility of DeKalb County on an equal basis with other operators of airports throughout the United States.

PART III

3. DOES PETITIONER HAVE STANDING TO SUE DEKALB COUNTY, GEORGIA, AS A BENEFICIARY OF THE NUMEROUS GRANT AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND DEKALB COUNTY, GEORGIA?

Petitioner also contends that the Courts below erred in failing to recognize Petitioner's right of recovery as a beneficiary of the contracts entered into between the United States and DeKalb County, Georgia. With

regard to said issue, Petitioner contends, and has demonstrated by an attachment to her Complaint (A.26), that DeKalb County, Georgia, has executed, since 1960, six Federal Grant Agreements with the United States of America. In said Agreements, DeKalb County obligated itself to perform certain duties with regard to the operation of said airport, as well as the land lying in the immediate vicinity thereof. The Court is referred to the Statement of the Case of Petitioner herein for a few excerpts taken from said Contract, which are denominated as "Sponsor's Assurances." For a more complete examination of said Assurances, the Court is referred to pages 26 through 39 of the Joint Appendix filed in this action. Without repeating what has heretofore been said, or which may be found by a closer review of the specific wording of said Assurances, DeKalb County *inter alia* obligated itself to operate DeKalb-Peachtree Airport for the "use and benefit of the public"; prohibit any "activity thereon which would interfere with its use for airport purposes"; not make or permit the making of "any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA"; and within its power and to the extent reasonable, "take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations *including landing and take-off of aircraft.*" (Emphasis added.)

It is undisputed that each and every Assurance hereinabove stated and just quoted was violated by DeKalb County, Georgia (as this Court must assume in ruling upon a motion to dismiss for failure to state a claim upon which relief can be granted). Nevertheless,

DeKalb County received in excess of $1,025,224.06 in exchange for these "Sponsor's Assurances." More particularly, it is contended and shown that DeKalb County, Georgia, violated said Agreement and permitted a garbage dump to be maintained upon and adjacent to DeKalb-Peachtree Airport. These actions constituted a willful violation of the subject Grant Agreements established and Assurances given by respondent. As a result of said breach, birds were permitted to congregate alongside of and upon DeKalb-Peachtree Airport, which condition was wholly incompatible with defendant's obligation to maintain safe airport-operations, and which were further an extreme hazard to the normal landing and taking off of aircraft from said airport.

It is undisputed that the law of the State of Georgia permits a county to be sued upon any contract which it is authorized to make. *Deason v. DeKalb County*, 222 Ga. 63 (1966); *Washington County v. Sheppard*, 46 Ga. App. 240 (1933). There then remains the question as to whether DeKalb County may be sued in contract by a third-party beneficiary of said contract, and, if so, whether a defense of sovereign immunity is applicable with regard thereto.

As to third-party beneficiary status, and Petitioner's right and entitlement to proceed with regard thereto, eight judges of the en banc panel concluded that Federal law would be applicable, and that as such, Petitioner was not entitled to recover. The majority of the original panel, and five members of the en banc panel in the Court below, concluded that Georgia law was applicable and should be utilized to determine Petitioner's rights. It is Petitioner's position that irrespective of

which interpretation is utilized, she is clearly an intended third-party beneficiary for whose benefit the Assurances were given, and that upon the breach of such Assurances by a party to said contract, a right of action should and does exist.

Under Georgia law, and pursuant to Georgia Code Annotated §3-108, it is clear that a beneficiary of a contract made between other parties, may maintain an action against the promisor on said contract despite the fact that he furnished no consideration for the promise. *Sheppard v. Bridges*, 137 Ga. 615 (1911). In the case at bar, there is no dispute as to the right of Respondent to contract with the United States for the construction and maintenance of airport properties and runways, and thus any contract entered into between Respondent and the United States was with full statutory authorization. *See*, Georgia Code Annotated §11-201. Applying the concept of third-party beneficiary status to the question of Petitioner's right to recover for personal injuries and wrongful death, the Court is referred to the two holdings of the Georgia Supreme Court arising out of the death of Fannie Laura Williams on or about August 24, 1971. Said action first came to the Georgia Supreme Court in *Hancock County v. Williams*, 230 Ga. 723 (1973), upon the trial court's *refusal* to dismiss Hancock County pursuant to Georgia Code Annotated §23-1502, relating to governmental immunity. The Georgia Supreme Court affirmed the holding of the trial court, and in pertinent part, stated as follows:

> "The complaint as amended, showed a contract of easement between Hancock County and Georgia Power Company covering the area where the plaintiff's mother was killed, and in which contract

> the county agreed to indemnify Georgia Power Company for any damages arising out of the use of such easement by the county.
>
> "The Act of 1946 (Ga. L. 1946, p. 152; Code Ann. Ch. 69-6), authorizes counties to enter into contracts so as to provide recreational facilities within a county. Thus, the contract was authorized. Being an authorized contract, the action would lie thereon. Compare, *Decatur County v. Praytor & C. Contr. Co.*, 163 Ga. 929, 933 (137 SE 247).
>
> "The complaint as finally amended set forth a cause of action against Hancock County based upon the contract which was valid, and for this reason, and without the necessity of consideration being given to the constitutionality of Code §23-1502, the judgment of the trial court overruling the motions of Hancock County to dismiss the complaint and cross complaint were properly overruled." *Id.* at 724-25.

The Georgia Supreme Court found it unnecessary to consider the constitutionality and applicability of the governmental immunity statute, since the contract was authorized under another statute providing therefor. Stated somewhat differently, a county may properly be sued for damages arising out of wrongful death where there exists a valid contract executed pursuant to statutory authority. This holding was reaffirmed by the Georgia Supreme Court in a later appeal of the same case, to wit, *Williams v. Georgia Power Company*, 233 Ga. 517 (1975), when the Court held as follows:

> "The appellants also contend that the trial court erred in giving the requested charges which limited the county's liability to that arising under the county's indemnity agreement with the Georgia Power Company.
>
> "There is no merit in this contention.

> "Since Code §23-1502 states that a county is not liable to suit for any cause of action unless made so by statute, the Court correctly charged the jury that the only liability of the county was under its indemnity contract with the power company." *Id.* at 518-19.

Consequently, the Court has reaffirmed its holding that Hancock County, Georgia, would be liable for wrongful death upon its contract entered into with the Georgia Power Company.

As further support for the proposition that under Georgia law members of the public are intended beneficiaries under contracts executed by a governmental agency and a private contractor despite the fact that no specific reference is made to the particular members of the public to be protected, and in the absence of any specific contractual provision stating the measures of damages to be afforded the injured beneficiaries of that contract, the oft-cited decision in *Smith v. Ledbetter Brothers, Inc.*, 111 Ga. App. 238 (1965), is of particular importance. In a contract executed between the State Highway Department of Georgia and Ledbetter Brothers, Inc., the latter party agreed to "provide all safeguards, safety devices, and protective equipment, and to take any other needed actions, on his own responsibility, or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the *public*. . . ." (Emphasis added.) Certain acts of negligence were alleged to exist in the failure of the contractor to perform his obligations under the agreement, resulting in substantial injuries to the occupants of a motor vehicle. In speaking to the question of whether the injured passengers were contemplated beneficiaries, and whether

they had standing to sue upon said contract, the Court held as follows:

> "A contract between the State Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the project inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240.

Consequently, under Georgia law, members of the public can, in the proper case, be within the contemplation of the parties as intended beneficiaries. *See, Holland v. Phillips*, 94 Ga. App. 361 (1956); *M. R. Thomason & Associates, Inc. v. Wilson*, 125 Ga. App. 658 (1972); *State Construction Company v. Johnson*, 88 Ga. App. 651 (1953).

It thus appears under Georgia law that counties may be sued upon those contracts which it is authorized to make, *Southern Airways Company v. DeKalb County*, 102 Ga. App. 850, *cert. denied*, 118 S.E.2d 234 (1960) (involving the very same airport and the very same county as the present litigation), and that a county in this State may be found liable and responsible for wrongful death damages by a third-party beneficiary of such contract, *Hancock County v. Williams, supra*. The Court will note that no decision as to sovereign immunity is required in order to apply the Georgia interpretation of third-party beneficiary liability.

Nevertheless, a majority of the en banc panel determined that the principle announced in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), would be inapplicable to the construction of contracts such as here involved. Stated somewhat differently, the en banc

panel concluded that federal common law interpretation should be applied to the determination of Petitioner's right as a third-party beneficiary, and after having so concluded, held that Petitioner's interests failed to comport with federal standards, and thus was not entitled to relief. However, the Court below failed to mention, distinguish, or even discuss those cited Federal Court decisions which specifically reached opposite conclusions. In particular, the Court in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975), concluded that private, noncontracting parties, may qualify as intended beneficiaries under the particular Act and type of FAA Grant Agreements involved in the present litigation. Likewise, the Court in *Town of New Windsor v. Ronan*, 321 F.Supp. 1286 (S.D. N.Y.), *affirmed*, 481 F.2d 450 (2nd Cir. 1973), concluded that after exhaustion of administrative remedies, judicial review is permitted as to the compliance of a party with Assurances made by that party to the Federal Government in a quit-claim deed of airport property.

Most significant of all decisions is the holding in *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971), wherein the Court of Appeals recognized and applied to substantially identical Grant Agreements as that here involved the tests stated by this Court in *Barlow v. Collins*, 397 U.S. 159 (1970), to wit, (1) Do the plaintiffs have a personal stake and interest that impart the concrete adverseness required by Article III of the United States Constitution? (2) Are plaintiffs within the zone of interests to be protected or regulated by the statutory enactment? (3) Is judicial review precluded by said statutory scheme? It was undisputed by the Court in *City of Inglewood* that those

aircraft taking off and landing from said airport clearly were within the purview of those persons to be protected by the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq. The question presented to the Circuit Court was whether the citizens of the City of Inglewood had standing to sue the City of Los Angeles as a third-party beneficiary under a contract executed and entered into between the City of Los Angeles and the United States Government. Speaking to this issue, the Court concluded,

> "If Los Angeles made the assurances required by sec. 1716(c)(3) and sec. 1718(4) [49 U.S.C. §§1716(c)(3) and 1718(4)] in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents in the area. Any other interpretation of sec. 1716(c)(3) and sec. 1718(4) deprives them of any meaning or effect." *Id.* at 956.

Consequently, the Ninth Circuit has concluded that citizens of surrounding communities have a right of action against a contracting party to a Federal Grant Agreement as to the question of noise pollution. If that decision is to have any persuasive effect, then clearly, passengers aboard an aircraft taking off from the subject airport would certainly fall within the purview of those intended to be protected. The applicability of said holding to the present litigation is apparent.

Even more analagous to the case at bar, if that were possible, is the holding of the Court in *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D. Pa. 1967), wherein the Court, in what is now considered the landmark bird ingestion case, arising out of a crash of an Eastern Air Lines Electra into Boston Harbor after ingesting birds into the engines thereof, concluded that, (a) airport users are in fact and in law third-party beneficiaries of the particular type Grant Agreements involved in the present litigation, (b) airport users are entitled to sue the offending party for breach of the covenants contained in such Grant Agreements, and (c) that a third party may claim for relief for wrongful death based upon breach of the type of Grant Agreements as are before the Court in the present litigation. Accordingly, the Court in *Rapp* concluded that the Sponsor's Assurances had been breached, and imposed liability thereon.

Therefore, under the aforesaid holdings, if federal law is applied to the construction of contracts executed pursuant to various Federal Aviation Statutes, then liability would properly repose with DeKalb County, Georgia.

With regard to other Federal holdings that have had occasion to consider third-party beneficiary status, the Court below in *Bossier Parrish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1957), considered a contract involving financial aid from the United States Department of Health, Education and Welfare to Bossier Parish School System. In return, the school board assured the United States that it would admit children of military personnel at the Army base on the same terms as were available to other children in such school

district. Actually, the board required the children to attend segregated schools. The parents of the Negro children affected brought a class action suit to allow their children to attend integrated schools. One of the questions raised was whether the children had standing to sue. In answer to this question, the Court below stated,

> "Defendants by their contractual assurances have afforded rights to these Federal children as third-party beneficiaries concerning the availability of public schools." *Id.* at 850.

Consequently, without even passing reference being made to its earlier holding, the Court below concluded that Federal law did not permit Petitioner to sue for the losses she has sustained. Likewise, the Court below in *Seaboard Air Line Railroad v. County of Crisp of State of Georgia*, 280 F.2d 873 (5th Cir. 1960), *cert. denied*, 375 U.S. 942 (1961), concluded that a county could be responsible under a duty imposed by the Federal Power Act for breach of its assurances with regard thereto.

In brief, it is Petitioner's contention that those cases heard and determined by this Court which are most closely analagous to the present factual situation do not impose a federal common law rule for the determination of third-party beneficiary status. *See, Bank of America v. Parnell*, 352 U.S. 29 (1956); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). Further, even if federal common law were determined to be applicable to the interpretation of the subject Grant Agreements, then Petitioner has consistently been recognized to fall within the category of persons for whose especial benefit the Assurances were required.

Lastly, in the event Georgia law is applicable, the law of this State permits, recognizes, and allows a third-party beneficiary to sue a county upon a contract which it is authorized to make for damages arising out of wrongful death. The cases cited by the en banc court are factually distinguishable from the present litigation or do not support the position therein advanced, while those cases which have had occasion to construe and interpret the particular Federal Airport and Airway Development Act of 1970, as well as Grant Agreements and contracts issued pursuant thereto, uniformly establish the right of neighboring communities and persons injured and affected thereby to maintain an action for the losses sustained.

Accordingly, Petitioner requests that the opinion of the Court below be reversed, as without legal bases.

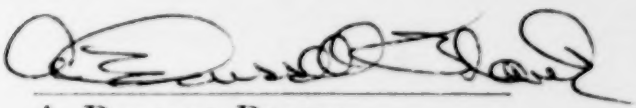
CONCLUSION

For the above and foregoing reasons, Petitioner contends that the Court Below erred in finding that Petitioner failed to state a claim upon which relief can be granted. The holding of the Court below is in contravention of the majority of Federal and State statutes which have had occasion to consider and construe the applicability of the Federal Aviation Statutes and the particular contracts and Grant Agreements of the type here involved. The continued enforcement and recognition of sovereign immunity, at least as to county action in the area of Federal Aviation, imposes a burden upon interstate commerce, results in a deprivation of Petitioner's equal protection rights, and a denial of contractual accountability which should be imposed upon Respondent herein. Accordingly, Peti-

tioner herein respectfully prays that this Court will reverse the holding of the United States Court of Appeals for the Fifth Circuit and remand this action for further proceedings under the Federal Aviation Statutes and the Grant Agreements herein involved.

Respectfully submitted,

ROSS & FINCH



A. RUSSELL BLANK

3417 First National Bank Tower
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Brief by depositing a copy of same in the United States Mail with sufficient postage affixed thereto, addressed to each of the following:

MR. RONALD R. GLANCZ
Appellate Section, Civil Division
U. S. Department of Justice
Washington, D. C. 20530

MR. WILLIAM D. MALLARD, JR.
Assistant U. S. Attorney
Post Office Box 912
Atlanta, Georgia 30301

MR. MEADE BURNS
Long, Weinberg, Ansley & Wheeler
300 Cobb Federal Building
191 Lawrence
Marietta, Georgia 30060

MR. WENDELL K. WILLARD
Harvey, Rhodes & Willard
125 Trinity Place
Decatur, Georgia 30030

MR. J. ARTHUR MOZLEY
Smith, Cohen, Ringel, Kohler & Martin
2400 First National Bank Tower
Atlanta, Georgia 30303

This 2 day of March, 1977.

A. RUSSELL BLANK
Of Counsel for Petitioner